LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 10 1958
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES.

No. ~~1059~~ 93 458

LELAND R. COOK et al.,
Petitioners,

v.

BROTHERHOOD OF SLEEPING CAR PORTERS et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Missouri

and

APPENDIX.

VICTOR PACKMAN,
HENRY D. ESPY,
Attorneys for Petitioners.

Of Counsel:
JOSEPH C. WADDY,
HARVEY FELDMAN.

INDEX.

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes and constitutional provisions invoked and deemed pertinent	4
Statement	4
Reasons for allowance of writ	8
Argument	9
Appendix:	
Opinion	23
Circuit Court's memorandum opinion and judgment	44
Memorandum opinion and judgment	44
Judgment of the Supreme Court of Missouri	45
Extract from Constitution of the United States	45
Extract from Railway Labor Act, 45 U. S. C., Ch. 8	45
Section 153 (i), Railway Labor Act, Title 45, 153 U. S. C. A.	46
Section 527.010 of the Declaratory Judgment Act of Missouri	46
Amended petition	47
Exhibit 1—Memorandum agreement	56
Exhibit 2—Agreement	58

Cases Cited.

Alabaugh v. Baltimore & Ohio Railroad Company, 222 Fed. 2d 861 18-19

Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768, 774, 96 L. ed. 1283 ..... 12, 16

Brotherhood of Trainmen v. Luckie, 268 S. W. (2nd) 712 12

Central Georgia Railway Company v. Culpepper, 76 S. E. (2d) 482, 209 Ga. 844 13

Conley v. Gibson, 2 L. ed. (2d) 80, 83, 84 ..... 13, 21

Donahoo v. Thompson, Trustee, 291 S. W. (2d) 710 (Mo. en banc) 15

Ford Motor Company v. Hoffman, 345 U. S. 330, 73 S. Ct. 681 21

International Association of Machinists v. Gonzales, ... U. S. ..., May 26, 1958 22

International Chemical Workers Union, 115 N. L. R. B. 772 18

International Union U. A. W. A. v. Russell, ... U. S. ..., May 26, 1958 22

Lamon v. Georgia Southern & Florida Railway Co., 90 S. E. (2d) 658, 212 Ga. 63 12

Leland R. Cook et al. v. Brotherhood of Sleeping Car Porters et al., 309 S. W. 2d 579 ..... 1, 11

Machinists Lodge 1021 (1956), 116 N. L. R. B., No. 92 18

Moore v. Illinois Central Railway Co., 312 U. S. 630, 634, 635, 636, 85 L. ed. 1089, 1092, 1093 14

Mount v. Grand International Brotherhood of Locomotive Engineers, 226 Fed. (2d) 604, 607 21

National Labor Relations Board v. Aluminum Workers International Union, Local No. 135, 230 F. 2d 515 18

Radio Officers' Union A. F. L. v. N. L. R. B., Cal. 1954, 74 S. Ct. 323, 347 U. S. 17, 98 L. ed. 455 17

Railway Employees Dept. A. F. L. v. Hanson, 351 U. S. 225, 238, 100 L. ed. 1112, 1134 17

Sheets v. Seldon, 7 Wall. 416, at 421-422, 19 L. ed. 166, at 168 17

Steele v. L. & N. Railroad Co. et al., 323 U. S. 192, 89 L. Ed. 173 (1944) 9, 13

Transcontinental & Western Air, Inc., v. Koppal, 345 U. S. 653, 97 L. ed. 1325, 1330 14

Trans-Lux Radio City Corporation v. Service Packing Corporation, 54 A. 2d 144, 75 Washington Law Rep. 787 (D. C. Mun. App.) 17

Tunstall v. Brotherhood, 323 U. S. 210, 212, 89 L. Ed. 187 (1944) 9

Union Starch and Refining Co. v. N. L. R. B., 186 F. (2nd) 1008, 1012 17

Statutes Cited.

Declaratory Judgment Act of Missouri, Chap. 527, R. S. Mo. 16

Section 152 Eleventh (a) of the Railway Labor Act, 45 U. S. C., Ch. 8 ..... 2, 4, 5, 6, 8, 13

Section 153 (i) of the Railway Labor Act, 45 U. S. C., Ch. 8 ..... 4, 8, 13

28 U. S. C., Section 1257 (3) 2

Textbooks Cited.

Pomeroy, Equity Jurisprudence (4 ed.), Sect. 453 .. 17

Story, Equity Jurisprudence (14 ed.), Sect. 1727 ff.. 17

Miscellaneous.

H. R. Rep. No. 2811, 81st Congress, 2d Session 4 (1950) 17

SUPREME COURT OF THE UNITED STATES.

No. .....

LELAND R. COOK et al.,
Petitioners,

v.

BROTHERHOOD OF SLEEPING CAR PORTERS et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Missouri.

Above named Petitioners pray for a Writ of Certiorari to review the judgment of the Supreme Court of Missouri rendered on the 13th day of January, 1958, in Cause No. 45,783 entitled, "Leland R. Cook et al., Appellants, vs. Brotherhood of Sleeping Car Porters, Respondents."

OPINION BELOW.

Leland R. Cook et al. v. Brotherhood of Sleeping Car Porters et al., is reported in 309 S. W. 2d 579. Copy thereof is appended.

JURISDICTION.

The judgment of the Supreme Court of Missouri was entered on the 13th day of January, 1958. Petitioners' Motion for Rehearing was overruled on the 10th day of February, 1958. This Court entered an Order on May 8, 1958, extending the time for filing petition for a writ of certiorari, to and including June 10, 1958. Jurisdiction of this Court to review the judgment is invoked under Title 28, U. S. C., Section 1257 (3).

QUESTIONS PRESENTED.

1) Whether the Union Shop agreement of March 9, 1953, between the Brotherhood and Carrier, purportedly sanctioned under Section 152, Eleventh (a) of the Railway Labor Act, was legal and binding on these Petitioners, who were not members of the Brotherhood and had no notice of intention of the Brotherhood to enter into that agreement, or opportunity to be heard thereon, or authorize the Brotherhood to act for them, although members of the Brotherhood had an opportunity to discuss same in advance and act through delegates who voted thereon, and whether this question was a matter for a Court to pass on and not the National Railroad Adjustment Board.

2) Whether the State Court had jurisdiction to pass on the validity of certain terms of the aforesaid Union Shop agreement, as well as its general validity based on its manner of execution. In said Union Shop agreement it was falsely made to appear that Petitioners, who were not members of the Brotherhood (the collective bargaining representative for their craft), had empowered it to agree in their behalf to such conditions as follows:

(1) That they will join and maintain membership in the Brotherhood of Sleeping Car Porters within

sixty days following the effective date of the agreement.

(2) That if they fail to do so that they are to be discharged.

(3) That on any question of their retention of employment under the agreement, they waived the safeguards embodied in the investigation and discipline rules covering their working conditions [See Section 5 (e) of Exhibit 2 in Appendix hereto].

(4) That if their services are terminated under the agreement they shall have no time or money claims by reason thereof (See Section 7 of Exhibit 2 in Appendix).

(5) That in the event that they question the validity of any discharge order, and there is a hearing before a "Neutral" that they will pay one-third of the fees, salary and expenses of the Neutral [See Section 5 (c) of Exhibit 2 in Appendix].

3) Whether Petitioners had the right, under the circumstances, to seek redress against the Brotherhood in a Court of Equity to enjoin their threatened discharge after exhausting administrative remedies under the Union Shop agreement, without resorting to the National Railroad Adjustment Board.

4) Whether the National Railroad Adjustment Board had exclusive primary jurisdiction or any jurisdiction to decide the right of Petitioners to damages against the Brotherhood (its collective bargaining agent) for illegally and maliciously interfering with Petitioners' seniority and employment rights.

5) Whether Petitioners could be discharged by Carrier for not being members of the Brotherhood after tendering it initiation fees and dues before the effective date of their

discharge. Said tender they claim was rejected maliciously by the Brotherhood for reasons other than failure to tender initiation fees and dues uniformly required as a condition of acquiring membership and whether a Court had the power to pass on the motivation of the Brotherhood in refusing the initiation fees and dues tendered by the Petitioners, or whether the National Railroad Adjustment Board, as determined by the State Court, had exclusive primary jurisdiction over that issue.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOKED AND DEEMED PERTINENT.

See Section 152 Eleventh (a) of the Railway Labor Act, 45 U. S. C., Ch. 8, as amended January 10, 1951, and Section 153 (i) of the Railway Labor Act, 45 U. S. C., Ch. 8, and the due process provisions of the Fifth Amendment to the Constitution of the United States. Also Section 527.010 of the Declaratory Judgment Act of Missouri. Pertinent extracts are included in the Appendix hereto.

STATEMENT.

Petitioners who have been employed by the Missouri Pacific Railroad Company (hereinafter referred to as Carrier) at head-end braking and other duties, under designation of train porters with seniority rights from dates indicated in footnote,* filed suit in the Circuit Court of the City

---

* Rufus Pettis, April 28, 1913.
John F. Price, June 24, 1923.
James Ritchie, August 3, 1926.
Leland R. Cook, July 8, 1937.
I. B. Woods, December 5, 1940.
Isom McMoore, December 14, 1942.
Lonnie Gigers, December 17, 1942.
Kelly May, February 15, 1943.
Curtis J. Neal, July 7, 1943.
Hopson Wilson, May 16, 1945.

of St. Louis against the Brotherhood of Sleeping Car Porters (hereinafter referred to as the Brotherhood) and the Carrier to prevent the discharge of Plaintiffs from their jobs because of their alleged failure to join the Brotherhood within sixty days of the date fixed by a Union Shop agreement, dated March 9, 1953, entered into between the Brotherhood and Carrier at the behest of the Brotherhood. (See Exhibits 1 and 2 in Appendix hereto.)

Petitioners contended that the agreement was invalid in its terms, claiming it went beyond the authority of a labor organization and carrier sanctioned by Section 152 Eleventh (a) of the Railway Labor Act, and also contended the agreement was invalid because of its manner of execution without their consent or notice to them, or an opportunity to be heard thereon, although members of the Brotherhood had been given an opportunity to discuss same locally, and to act thereon at a Brotherhood convention through delegates (R. 308, 309, 310).

Petitioners charged that the Brotherhood used its position as a collective bargaining representative under the Railway Labor Act to unlawfully interfere with Plaintiffs' seniority and employment rights and sought to effectuate their discharge in violation of the Railway Labor Act and of due process rights of Petitioners under the Fifth Amendment to the United States Constitution and that principles of equity barred their discharge.

They further alleged that they had fully exhausted administrative remedies set forth in the foregoing agreement and that the adverse ruling therein was not in accordance with said administrative due process and was subject to review by a Court; that their discharge and loss of seniority rights was imminent and could only be prevented by a Court of Equity. That they had tendered initiation fees to the Brotherhood prior to their effective discharge, but that

membership in the Brotherhood was maliciously* denied them for reasons other than their failure to make such tender, and that under Section 152 Eleventh (a) of the

---

* Petitioners presented evidence that they had sponsored litigation in 1949 against four of the white Railroad Brotherhoods in which they contended, among other things, that they were head-end brakemen, although designated, for racial and economic reasons, by the carrier as train porters, and that the Brotherhood of Railroad Trainmen which represented the brakemen craft had failed to protect them in their right to equal pay for equal work because they were Negroes. It was brought out at the trial in this matter that the Brotherhood herein was hostile to the views of the plaintiff in that suit, and had intervened for the purpose of *killing* it. Petitioners feared that if they joined the respondent Brotherhood it would be inimical to their interests and prejudice their suit. It is still pending in the Circuit Court of the City of St. Louis, *King and Harness v. Boggs et al.*, No. 32,611.

T. D. McNeal (an International Vice-President of the Brotherhood of Sleeping Car Porters), a Respondent herein, at the trial was asked (304 and 304 of the Record):

"Q. Mr. McNeal, I show you what has been marked as Plaintiffs' Exhibit 124 and ask you if that is your signature (handing document to the witness)? A. It looks a little bit off, but I am responsible for the letter, if that is what you want.

* * * * * * * *

Q. Mr. McNeal, I am reading from Plaintiffs' Exhibit 124 (reading): 'In the opinion of our lawyers, the Court's order sustaining our motion to intervene kills the King and Harness suit, for when the matter is heard on its merits we will be able to prove that the train porters employed by the Missouri Pacific are actually represented by the Brotherhood of Sleeping Car Porters.'

* * * * * * * *

Q. I show you what has been marked Plaintiffs' Exhibit 125, and ask you if that is your signature? A. That's right."

* * * * * * * *

Relevant portions of said Exhibit 125 read as follows:

"Brotherhood of Sleeping Car Porters
11 N. Jefferson Avenue, No. 413
St. Louis 3, Missouri
March 16, 1954

International Offers to Drop Fight on Missouri Pacific.

On Three different occasions within the last month the International Association, through its President, Mr. Whitaker, and

Railway Labor Act the lack of such membership thereafter in such Brotherhood could not be set up as a prerequisite to their job retention. That Plaintiffs under the circumstance could not be required under the Railway Labor Act to join the Brotherhood as a condition of their continued employment with the Carrier.

They prayed for a declaratory judgment to vindicate their contentions and for temporary and permanent injunctive relief to prevent their discharge under the circumstances, and for compensatory and punitive damages. Copy of their amended petition is included in Appendix hereto.

Defendants, in their Answers, challenged the jurisdiction of the lower Court to pass on the issues and claimed Petitioners had failed to exhaust their administrative remedies under the Railway Labor Act and that the tribunals set up under that Act had exclusive primary jurisdiction over the subject matter. Other defenses were set up not germane to the issues herein.

---

its lawyer, Mr. Waddy, have asked the Brotherhood to let them drop and get out of the fight they started on the Missouri Pacific.

* * * * * * * *

"The President and Chief lawyer for the International offered to withdraw their suit against the Brotherhood, to withdraw their request for an election, to have the 14 men who are out of the union join and pay up all they would owe, if the Brotherhood would agree to let these 14 men continue working.

After receiving this offer at Chicago, Vice President McNeal discussed it with officers of Local No. 5 and with other International officers of the Brotherhood. Everyone agreed that there should be no compromise. Therefore, in the conference at Washington on March 11, 1954, the representatives of the International were told that we are not going to agree to letting these 14 men continue to work and that all they can expect out of us is to fight them as long as we can see them. Thus, the fight will continue and we are convinced that when it is all over the victory will be ours. They started this fight—but Brotherhood men are going to finish it for them!"

* * * * * * * *

Although a trial was had, the trial Court did not rule on the merits of the evidence but dismissed "Plaintiffs' claim", for lack of jurisdiction, "in accordance with the prayers of Defendants' Answers". Copy of the Circuit Court's Memorandum Opinion and Judgment is contained in appendix.

A temporary injunction which had been issued to prevent the discharge of Petitioners was permitted to remain in force pending disposition of appeal to the Supreme Court of Missouri. That Court, on appeal, in its judgment, "affirmed in all things" (including its form) the order and judgment of the lower Court of dismissal for lack of jurisdiction. Its judgment is also appended.

REASONS FOR ALLOWANCE OF WRIT.

Interpretations of the Railway Labor Act—45 U. S. C., Section 151 et seq., and of Section 152—Eleventh (a) and claimed violation of rights of petitioners thereunder, as well as Section 153 (i) of the Railway Labor Act are involved in this matter; also a claim of impairment of due process rights of petitioners under the Fifth Amendment to the Constitution of the United States. Petitioners contend the determinations of the federal questions in this matter by the Missouri Supreme Court have been erroneous and have not been consistent with interpretations of the Railway Labor Act and of the 5th Amendment to the United States Constitution by this Court.

In addition, federal questions of substance under the Railway Labor Act not heretofore determined by this Court are involved and we believe have been determined by the Supreme Court of Missouri in a manner contrary to the trend of the decisions of this Court and not in accord with the provisions of the Railway Labor Act and of applicable decisions of this Court. See Item 5 of **Questions Presented.**

ARGUMENT.

A.

One of the questions concerning the Union Shop agreement turns on whether it is binding upon non-members of the Brotherhood who did not sanction it and who had no voice in its negotiation or notice of the intention to sign same.

The duty of the collective bargaining representative chosen by the majority to represent fairly all members of a craft and to consider the views of non-union members **on due notice** was declared by the Supreme Court of the United States in the case of Steele v. L. & N. Railroad Co. et al., 323 U. S. 192, 89 L. Ed. 173 (1944). The Court stated the Statute requires a representative of a craft in collective bargaining in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.

> "**Wherever necessary to that end, the union is required to consider requests of non-union members** of the craft and expressions of their views with respect to collective bargaining with the employer **and to give to them notice of and opportunity for hearing upon its proposed action.**" (Emphasis ours.)

To the same effect see: Tunstall v. Brotherhood, 323 U. S. 210, 212, 89 L. Ed. 187 (1944).

Union members were consulted in adyance concerning the planned agreement. It was put to a vote at a Brotherhood convention. No similar opportunity to be heard or notice was given to non-union members (R. 308, 309, 310).

In its report the Senate Committee on Labor & Public Welfare emphasized that this requirement of fair and impartial representation laid down in the Steele and Tunstall

cases was not to be relaxed because of the enactment of the Union Shop Amendment (Senate Report, No. 2262, 81st Congress, 2d Session).

This reiteration of the principle of fair representation was made because of the obvious possibility of misrepresentation where the authority for a closed shop agreement runs direct to the union, and the realization any such agreement would fasten upon members of the craft or class, for the benefit of the union, obligations, and burdens they must meet in order to keep their jobs. Under such circumstances, the possibility of a conflict of interests existed between the Brotherhood and the craft members, particularly those who, like petitioners, were not members of the Brotherhood. Ordinary fairness required that the Brotherhood give them notice and opportunity to be heard prior to imposing on them burdens and obligations which favored the Brotherhood and which, as part of the bargain, altered employment rights at the expense of petitioners not only for the benefit of the Brotherhood but also for the Carrier.

The result of lack of notice in this matter to Petitioners has been the creation of a situation wherein it is made to appear falsely that plaintiffs have agreed to such conditions in the Union Shop Agreement as the following:

(1) that, on any question of their retention in employment under the agreement they waive the safeguards embodied in the investigation and discipline rules covering their working conditions [Section 5 (e)]; (Exhibit 2 in Appendix).

(2) that if their services are terminated under the agreement they shall have no time or money claims by reason thereof (Section 7) and

(3) that if their position in a hearing before a "Neutral" is not sustained they will pay one-third of the fees, salary and expenses of the "Neutral" [Section 5 (e)].

The above-mentioned provisions of the Union Shop Agreement demonstrate that the Brotherhood, without giving plaintiffs any notice or opportunity to be heard, used its statutory position not only to make an agreement requiring them to join and maintain membership in the Union as a condition of their continued employment **but also to contract away other substantial rights possessed by plaintiffs.** Plaintiffs never agreed to any such conditions and did not even know that they were being proposed.

Instead of following the doctrine of the Steele case, the Missouri Supreme Court, in its Opinion, 309 S. W. (2d), l. c. 587, stated:

> "They say that the contract was negotiated and executed without notice to them or any opportunity to be heard on the question. We find no requirement in the Act or in the cases of such a notice to individuals."

We believe the Court misunderstood the Steele case and others to the contrary. In "Steele", the Court had previously stated (323 U. S. 195, 196) re an agreement made by the Railroad Brotherhood which controlled the seniority rights and restricted the employment of Negro firemen, that they **"were not given notice or opportunity to be heard with respect to either of these agreements which were put into effect before their existence was disclosed to the Negro firemen."**

In that case, the Negro firemen were just a small percentage of the firemen involved and the Brotherhood was a white Brotherhood. Yet, this Court did not say, as the Missouri Supreme Court did, on page 588 of its Opinion:

> "Under these circumstances it would be the rankest speculation to say that notice to these plaintiffs would have been of any benefit to them.".

Instead, it said:

> "Whenever necessary to that end, the Union is required to consider requests of non-union members . . . with respect to collective bargaining . . . and to give them notice of and opportunity for hearing upon its proposed action." l, c. 204.

B.

Disputes which involve the **validity** of a bargaining agreement between a Railroad and a Union, and not its meaning, cannot be resolved by interpretation so as to give jurisdiction to the Railway Adjustment Board to the exclusion of State Courts. **Lamon v. Georgia Southern & Florida Railway Co.**, 90 S. E. (2d) 658, 212 Ga. 63.

Where a dispute involves the **validity** of a contract and not its meaning, the employees must look to a judicial remedy to prevent the sacrifice of their rights under the Railway Labor Act. **Brotherhood of Railroad Trainmen v. Howard**, 343 U. S. 768, 774, 96 L. ed. 1283. This is not a case involving the construction or interpretation of a collective bargaining agreement. The dispute arises out of a contract the validity of which has been challenged both as to preliminaries to its execution and as to its terms.

In **Brotherhood of Railroad Trainmen v. Luckie**, 268 S. W. (2nd) 712, the Court of Civil Appeals of Texas upheld the granting of a temporary injunction to prevent the placing into effect of a directive of the chief executives of four Railroad Brotherhoods which would have taken employees of the "Katy" Railroad off their own passenger trains and substituted Texas and Pacific men for them, and would have resulted in loss of employment and interference with the seniority rights of the plaintiffs. The court held that the issue there did not involve interpretation of the order, but was rather an outright attack **upon**

its validity (l. c. 715). The **Howard** case, supra, and the **Steele** case, supra, were relied on by the Texas Court of Appeals.

C.

It will be observed from a reading of pertinent sections of the agreement in this matter (Exhibit 2 in the Appendix) that it went beyond the scope of Section 152, Eleventh (a) of the Act. There was no authority granted under Section 152, Eleventh (a), for a provision that on any question of the employer's retention of employment under the agreement the safeguards embodied in the investigation and discipline rules covering their working conditions would not apply. [See Section 5 (e).] There was no permission granted under the Railway Labor Act that if plaintiffs' services are terminated under the union shop agreement they shall have no time or money claims by reason thereof . . . (see Section 7).

Whether such provisions were valid in a Union Shop agreement was for a Court to decide. In fact the controversy herein which is essentially **between the petitioners and the Brotherhood** is not even within the jurisdiction of the Railroad Adjustment Board. Section 153 (i) of the Railway Labor Act, by its terms, limits disputes cognizant by the Board to those between an employee or group of employees **and** a carrier or carriers, as well as to types, of which this is not one. (**Conley v. Gibson**, 2 L. ed. [2d] 80, 83, 84.)

In **Central Georgia Railway Company v. Culpepper**, 76 S. E. (2d) 482, 209 Ga. 844, the Supreme Court of Georgia had before it a suit to enjoin a railroad from putting in effect certain plans for reassignment of firemen which the plaintiffs claimed to be in violation of an agreement. The judgment of the lower court was affirmed. It held that the Railway Labor Act did not vest exclusive jurisdiction in the Adjustment Board of a type of case involving a

potential discharge and cited **Moore v. Illinois Central Railway**, 312 U. S. 630, 635, 636. Although the relief sought was different in the Moore case, as he sought damages for breach of his employment contract and his unlawful discharge, it nevertheless pertained to relief for breach of contract and the Georgia Supreme Court ruled that injunctive relief to prevent a breach of contract which might result in irreparable injury was proper. Hence, it was not necessary to go first before the Railroad Adjustment Board.

D.

The Supreme Court of Missouri in its Opinion, must have misunderstood the Petitioners' position with reference to the lack of necessity for, or the inadequacy of administrative remedies in connection with the subject matter of their lawsuit. The Appellants contend, on the basis of **Transcontinental & Western Air, Inc., v. Koppal**, 345 U. S. 653, 97 L. ed. 1325, 1330, that they have gone as far as they have to in connection with administrative remedies under the terms of their employment contract.

This Court, in **Transcontinental & Western Air, Inc., v. Koppal**, 345 U. S. 653, 97 L. ed. 1325, 1320, quotes with approval from its earlier decision of **Moore v. Illinois Central Railway Co.**, 312 U. S. 630, 634, 636, 85 L. ed. 1089, 1092, 1093:

> "We find nothing in that (Railway Labor) Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court . . ."

In the **Koppal** case the Court also made its earlier ruling in the **Moore** case and **Slocum** case, 339 U. S. 239, 94 L. ed. 795, plainer by adding that if, **by virtue of the employment contract**, administrative determinations thereunder

were prerequisite, and if the law of the State required prior fulfillment of **such** administrative determinations, then before one could resort to a court in connection with a controversy over wrongful discharge, the practice required under State law of fulfillment of the administrative prerequisites would have to be shown before a court could take cognizance of the controversy. There is nothing in the **Koppal** case nor in any United States Supreme Court case to the effect that the optional administrative remedies **under the Railway Labor Act** of going to the Adjustment Board under certain circumstances would have to be fulfilled in a situation as here.

Donahoo v. Thompson, Trustee, 291 S. W. (2d) 710 (Mo. en banc), cited by the Missouri Supreme Court in its Opinion, did not hold that the administrative remedies to be followed were those which were optional under the Railway Labor Act, but, in italics, quoted from the Koppal case that the administrative remedies to be exhausted were "under his employment contract in order to sustain his cause of action." Such was done in this matter by Petitioners.

E.

We believe the Missouri Supreme Court also erred in this case in holding (309 S. W. [2d], l. c. 590):

> "The point made that the 'tender' of plaintiffs, made before completed discharge was sufficient and that they were, in fact, denied membership in the Brotherhood for other reasons, is a matter which must be considered in administrative proceedings."

We know of no cases that so hold.

Must the Appellants lose their jobs before the right to retain their jobs given them by Congress may be determined? The Adjustment Board does not issue injunctions,

and in view of Section 7 of the Union Shop agreement, "that if their services are terminated under the agreement they shall have no time or money claims by reason thereof", what could the Adjustment Board award? The motivation issue does not require any interpretation of a collective bargaining agreement calling for the special "expertise" of the Adjustment Board or of any other administrative agency under the Railway Labor Act, nor does it call for special knowledge of railroad jargon or practices. It turns on a right granted under the statute designed to safeguard against discrimination. The problem of the Petitioners raises an issue of judicial cognizance calling for a judicial remedy. See **Brotherhood of Railroad Trainmen v. Howard**, 343 U. S. 768, 774. Section 152, Eleventh, of the Act did not assign Union membership controversies to the Railroad Adjustment Board for disposition nor enlarge its jurisdiction.

F.

The State Court had jurisdiction under the Declaratory Judgment Act of Missouri, Chap. 527, R. S. Mo., to determine the legal effect of the tender by plaintiffs of initiation fees and dues and the rejection of the tendered fees and dues by the Brotherhood. Before their effective discharge, petitioners tendered their initiation fees and dues to the Brotherhood, which refused to accept them for reasons which Petitioners claim were malicious. Under the circumstances, the Statute forbids their discharge for not becoming members of the union.

It is not necessary for a Court to examine the agreement in any manner whatsoever for it to decide this issue. A favorable determination of this issue could dispose of the case. The right claimed is one expressly given by the Statute and the conduct complained of is expressly condemned by the Statute.

Congress yielded to the unions' demands that the Railway Labor Act be amended to permit union shop agreements because of the argument that all employees should share the cost of benefits obtained through collective bargaining. H. R. Rep. No. 2811, 81st Congress, 2d Session 4 (1950). This objective is reached through the payment of union dues by all the employees. The potential forfeiture of the job was obviously designed only as a means to **secure** the payment of these dues, and not for any other purpose.[1] If the initiation fees and dues are paid before discharge, the union receives all that the amendment was designed to secure for it. In rejecting the tender made here before the effective time of discharge, and before the time for a hearing on its propriety, the union eschewed the very benefits which the amendment was calculated to bestow upon it, and, instead, vindictively utilized the agreement as a means of penalizing the plaintiffs.

As this Court well knows, forfeitures are not looked upon with favor in equity.

Upon equitable principles, the Court will relieve a tenant from forfeiture of his lease for nonpayment of rent by permitting him, before or after judgment, but before execution is had, to pay the rent due with interest and costs. **Trans-Lux Radio City Corporation v. Service Packing Corporation,** 54 A. 2d 144, 75 Washington Law Rep. 787 (D. C. Mun. App.); Pomeroy, **Equity Jurisprudence** (4 ed.), Sect. 453; Story, **Equity Jurisprudence** (14 ed.), Sect. 1727 ff. **Sheets v. Seldon,** 7 Wall. 416, at 421-422, 19 L. Ed. 166, at 168. The forfeiture of a job—one's very livelihood—is a no less calamitous event than forfeiture of a lease. This has been recognized in cases arising under the National Labor Relations Act as amended.

---

[1] See *Railway Employees Dept. A. F. L. v. Hanson,* 351 U. S. 225, 238, 100 L. ed. 1112, 1134. Also see *Union Starch and Refining Co. v. N. L. R. B.,* 186 F. (2nd) 1008, 1012. C. f. *Radio Officers' Union A. F. L. v. N. L. R. B.,* Cal. 1954, 74 S. Ct. 323, 347 U. S. 17, 98 L. ed. 455.

In **National Labor Relations Board v. Aluminum Workers International Union, Local No. 135,** 230 F. 2d 515, the United States Court of Appeals for the Seventh Circuit upheld a determination of the National Labor Relations Board which in effect held that the discharge of an employee for failure to tender dues in time was discriminatory and not based upon a valid cause for discharge where the employee had, **prior to the actual discharge,** made a tender of the dues in question. The court stated the record does not present the usual "free rider" situation with which the discharge provisions of the act were designed to cope. The good faith of the employee was taken into consideration as well as the respondent's lack of good faith. It was the policy of the act to insulate employees' jobs from their organizational rights, and prevent utilization of union security agreements except to compel payment of dues and initiation fees (l. c. 519, 520). The reasoning of the National Labor Relations Board in the above case enforced by the Court of Appeals can be found in 112 N. L. R. B., No. 80. Among other things it stated:

> "The Trial Examiner, relying upon an earlier Board decision, in effect found that a belated tender does not forestall a valid discharge. However, we hold that a full and unqualified tender made any time prior to actual discharge, and without regard as to when the request for discharge may have been made, is a proper tender and a subsequent discharge based upon the request is unlawful."

To like effect, the Board held, in 1956, in **International Chemical Workers Union,** 115 N. L. R. B. 772, that full and unqualified tender **prior to actual discharge** would have been sufficient to prevent the discharge of the employee. The same principle was also sustained in **Machinists Lodge 1021** (1956), 116 N. L. R. B., No. 92.

The Circuit Judge stated in the Court's Memorandum Opinion and Judgment (see Appendix) that **Alabaugh v.**

Baltimore & Ohio Railroad Company, 222 Fed. 2d 861, compelled the Court to the conclusion that the plaintiff's claim should be dismissed for lack of jurisdiction in accordance with the prayers of defendants' answers. The Supreme Court of Missouri affirmed said judgment "in all respects" **including its form**, and refers with approval thereto in its Opinion. It therefore becomes important in this case that special analysis be given to the **Alabaugh** case relied on so heavily by the State Courts.

Alabaugh and other railroad employees sued to restrain the Brotherhood of Locomotive Engineers from forcing their discharge. On motion to dismiss the complaint the United States District Judge held that where plaintiffs voluntarily stopped paying dues to the Brotherhood and terminated their relationship therein to join a rival union which failed to qualify as a labor organization under the Act, and the Brotherhood refused them reinstatement, the employer was required to discharge them under the union shop agreement, and that the Railroad Adjustment Board had primary jurisdiction of the dispute. Hence, the District Court declined jurisdiction (125 Fed. Supp. 401). On appeal the lower court was upheld.

It should be noted at the very outset what was not involved in the **Alabaugh** case **which does exist in this case.**

In the **Alabaugh** case:

(1) No substantial question was raised as to the validity of any part of the union shop agreement.

(2) No question was raised as to the power or authority of the defendant Brotherhood to make a binding contract affecting the plaintiffs, as all of the plaintiffs therein were members of the defendant organization at time of making.

(3) No question was raised as to the validity of the agreement because of failure to give notice of the im-

pending contract to non-members of the union, although given to union members.

(4) No question turned on the good faith of the plaintiffs in not joining under the terms of the union shop agreement because of a belief that the union shop agreement was invalid and that it would prejudice a pending lawsuit against the carrier and other Railroad Brotherhoods in which the plaintiffs were contending that they were members of another craft, and were brakemen, in fact, although designated for racial and economic reasons as train porters by the carrier.

(5) No question was before the Court as to whether membership was denied the dissidents other than for failure to tender dues in the manner uniformly required.

(6) No question was raised as to whether the tender of the initiation fees and dues prior to discharge made it mandatory for the union to admit the plaintiffs into membership, irrespective of failure to tender within an allotted time fixed by the agreement.

(7) No question was raised as to whether the union agreement went beyond the power and authority of the defendant Brotherhood under Section 2, Eleventh, of the Railway Labor Act and other sections thereof.

(8) No question was raised on the right to recover damages in a court for a wrongful discharge or because of unlawful interference with job rights by third parties.

The court, in the **Alabaugh** case, as the Mo. Supreme Court did, 309 S. W. (2d), l. c. 588, distinguished the **Steele**, **Tunstall** and **Howard** cases on the ground that those cases dealt primarily with racial discrimination as to reason the parties were not compelled to go before the Adjustment

Board in those cases.*. The limited jurisdiction of the Adjustment Board as to both parties and subject matter were overlooked by the Missouri and Appellate Court in its sweeping generalization. See Conley v. Gibson, 2 L. ed. (2d). 80, 83, 84. The force and relevancy of the cases cited by us in connection with the subject-matter cannot be deflected by the fact in those cases that there was discrimination by white men against Negroes. The **Steele** case dealt with **hostile discrimination** and the intent of its decision was not limited to discrimination on account of race. The **Howard** case involved the **validity** of a contract and not its interpretation, and the law which the court laid down was not intended to apply only to cases involving disputes between Negroes and whites. e. g., **Ford Motor Company v. Hoffman**, 345 U. S. 330, 73 S. Ct. 681.

G. H.

The Union Shop Agreement Anticipated That Determinations Thereunder Would be Subject to Judicial Review.

It is plain from a reading of the union shop agreement that it was not seriously believed that decisions thereunder would be the "end of the line", and that the courts would have no right to set aside or review determinations thereunder. Section 7 of such agreement provided that if the final determination under Section 5 was that an

---

* The views of Judge Parker are subject to very serious question. Compare with the opinion of Judge Jones of the Fifth Circuit in *Mount v. Grand International Brotherhood of Locomotive Engineers*, 226 Fed. (2d) 604, 607.

Invalid contracts do not become valid merely because the parties complaining of their contents happen to be of the same race as the adversary parties. Discrimination is still discrimination, even though inflicted by a Negro railroad union against Negro employees of railroads. The principles of the *Steele*, *Tunstall* and *Howard* cases cannot be confined to situations in which whites are opposed to Negroes in connection with jobs.

employee's seniority and employment shall be terminated, no liability against the carrier in favor of the organization or other employees based upon the alleged violation, misapplication, or non-compliance with any part of the agreement should arise or accrue during the period up to the expiration while such determination **may be stayed by a court**, or while a discharged employee may be restored to service **pursuant to judicial determination.**

When a property right, the right to a livelihood, is involved, Courts cannot be barred from exercising their functions by agreements of third parties which interfere with such rights. The Brotherhood and Carrier could not deny or impair, in the union shop agreement, rights guaranteed to plaintiffs under the Fifth Amendment to the Constitution of the United States.

C. f. International Association of Machinists v. Gonzales, ... U. S. ..., May 26, 1958, and International Union U. A. W. A. v. Russell, ... U. S. ..., May 26, 1958.

The union shop agreement in this case should have been adjudicated as invalid and the rights of these plaintiffs to a livelihood vindicated by the State Court, as it had manifold jurisdiction over the subject matter.

Respectfully submitted,

VICTOR PACKMAN,
HENRY D. ESPY,
1096 Arcade Building,
St. Louis, Missouri,
Attorneys for Petitioners.

JOSEPH C. WADDY,
HARVEY FELDMAN,
Of Counsel.

June 9, 1958.

APPENDIX.

Opinion.

In the Supreme Court of Missouri.

September Session, 1957.

Leland R. Cook et al., Appellants,

v.

Brotherhood of Sleeping Car Porters et al., Respondents.

No. 45783. Div. 2.

(Caption abridged.)

Appeal From the Circuit Court of the City of St. Louis, Honorable Ivan Lee Holt, Jr., Judge.

This is a suit in equity filed by fourteen employees of the Missouri Pacific Railroad Company who are designated for collective bargaining purposes as "Train Porters"; defendants are the Brotherhood of Sleeping Car Porters, T. D. McNeal, a Vice-President thereof, the Missouri Pacific Railroad Company, and Guy A. Thompson, its Trustee (who needs no longer be considered). Plaintiffs have been so employed for relatively long periods, and as such they have acquired considerable seniority. They allege that, although they are classed as "Train Porters", the majority of their duties "consists of head-end braking". That contention is a matter which has long given rise to controversy and litigation, both in court and before administrative tribunals (State ex rel. S. L. & S. F. Ry. v. Russell, 358 Mo. 1136, 219 S. W. 2d 340), but we are concerned with it here, if at all, only as back-

ground material. More specifically, that concerns the proper craft classification of this group of employees. Concededly, as shown here, the defendant Brotherhood had long been certified by the National Mediation Board (Title 45 U. S. C. A., §§ 154, 155) as the bargaining representative of the craft of "Train Porters"; and the present transcript also shows that the Board had declined to recognize "Porter-Brakemen", as a separate craft or class. Consequently the plaintiffs, and perhaps others in like situation, were somewhat dissident members of the craft of "Train Porters"; they did not, at the times here in question, belong to the defendant Brotherhood, although concededly represented by it for bargaining purposes. While perhaps it is immaterial, the record shows that plaintiffs belonged to the International Association of Railway Employees (which will be referred to as the Association), sometimes described as a "rival union", and at least one of them was an officer of its local. That evidence was objected to by the plaintiffs; they do not rely here upon such membership as an exemption from membership in the Brotherhood under § 152, Eleventh (c) of the Act, as membership in a labor organization "national in scope." The status of such an organization must be previously determined and certified by the recognized tribunals. (Penn. RR Co. v. Rychlik, 352 U. S. 480, 1 L. Ed. 2d 480.)

Pursuant to Title 45 U. S. C. A., § 152, Eleventh (being the amendment of 1951 to the Railway Labor Act), and on January 31, 1951, the Brotherhood duly requested of the Missouri Pacific conferences for the purpose of negotiating a union shop agreement. Under date of March 9, 1953, a memorandum agreement was executed by these parties adopting the form of union shop agreement here involved; this, in fact, was a form of agreement similarly entered into by Missouri Pacific with certain other crafts. The agreement, which we shall usually refer to as "the

contract", was to be effective from April 1, 1953, and it covered "the employees * * * represented by the Brotherhood * * *." In strict conformity to the statute, supra, the contract (§ 1) required that "all employes * * * subject to the rules and working conditions agreements between the parties hereto * * * shall, as a condition of their continued employment * * * become members of the organization party to this agreement representing their craft or class within sixty calendar days of the date they first perform compensated service as such employes after the effective date of this agreement, and thereafter shall maintain membership in such organization; * * *." Section 4, also in conformity to the statute, provided that: "Nothing in this agreement shall require an employe to become or to remain a member of the organization if such membership is not available to such employe upon the same terms and conditions as are generally applicable to any other member, or if the membership of such employe is denied or terminated for any reason other than the failure of the employe to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. * * *" Section 5 provided the procedure for notice to the carrier of noncompliance, and for hearings, appeals, etc., by an employee who disputed his liability to discharge. The substance of these provisions will appear in the body of this opinion.

Plaintiffs (some or all) testified that they were not notified or consulted concerning the request for or negotiation of, the contract, and we may assume that none of them were; the testimony of defendant McNeal indicated that business meetings of the Brotherhood members were held (to which nonmembers were not invited), before or after the union shop agreement was requested, at which meetings the matter was discussed, but no vote was taken because the 1950 National Convention of the Brotherhood

had instructed its proper officers to negotiate for such a contract with the Missouri Pacific. The local was represented by a delegate at that convention. It seems clear that none of the plaintiffs gave the Brotherhood any specific authority to execute the contract.

On or about March 13, 1953, the Brotherhood (and in the use of this term, where appropriate, we include also the local) sent to each of the plaintiffs a letter stating that a union shop agreement had been signed, effective April 1, 1953, and that all employees classed as Train Porters were required "to become and remain financial members" of the Brotherhood within the specified sixty-day period after its effective date or become subject to dismissal; much more detail was stated concerning initiation fees, dues, mode of payment, etc., and a copy of the contract was enclosed with each letter. On May 21, 1953, the Brotherhood again wrote (by registered mail) to each of the plaintiffs, calling his attention to the fact that he had failed to comply with the union shop agreement, and expressing the hope that he would become a member before June 1, 1953; in part these letters stated: "* * * You can become a member by carrying or mailing the $25.00 joining fee to Secretary-Treasurer Will Newton, 1021 W. 29th Street, Little Rock, Arkansas, or to the Brotherhood of Sleeping Car Porters, 11 N. Jefferson Avenue, St. Louis 3, Missouri, in time to reach either place **BEFORE** June 1, 1953.

"In the event you have not become a member before June 1, 1953, under the terms of the Union Shop agreement, we will have no choice but to serve notice on the Missouri Pacific to terminate your employment and seniority under our working agreement. * * *"

On or about June 3, 1953, none of the plaintiffs having joined the Brotherhood, it notified the Missouri Pacific in writing, and separately as to each one, of the noncompli-

ance of each such employee with the contract, and requested that he be duly notified by the carrier. Thereupon the carrier promptly notified each plaintiff of the receipt of that request, and of the fact that he was thereby subject to dismissal. Thereupon each plaintiff, by letter to the carrier, requested a hearing before its proper official, in conformity with the contract procedure; all such hearings were held during the summer of 1953, the respective plaintiffs appearing personally, transcripts of the testimony or statements were made, and the result in each case was that the employee was thereafter notified in writing that he had been found to be in noncompliance with the contract and thus subject to discharge. At these hearings, so requested by the plaintiffs and held during the summer of 1953, each and every plaintiff was offered an opportunity to join the Brotherhood then, upon its agreement to drop the dismissal proceedings (although the sixty-day period had expired), but each of them declined. Each of the plaintiffs thereafter notified the carrier, in due course, that he appealed from this decision to the carrier's chief personnel officer; such appeals were considered on the records and in accordance with the stated procedure of the contract, and the respective plaintiffs were all notified that after a review of the records the conclusion had been reached that they had failed to comply with the contract and that the decision appealed from was sustained. Various plaintiffs testified that they had sought permission at the respective hearings to be represented by an attorney who was then present with them, but that the attorney was either excluded from the room or was not allowed to participate. Following the notifications of affirmance, each plaintiff requested of the carrier (August-September, 1953) the appointment of a "neutral" to decide the dispute, under the terms of § 5 of the contract. The parties being unable to agree on a neutral, the National Mediation Board appointed Judge John W. Yeager of the Supreme

Court of Nebraska to act as such. Hearings were held by him on November 9, 10 and 11, 1953, and under date of November 17, 1953, Judge Yeager notified each plaintiff of his finding that such plaintiff had "failed to comply with the terms and conditions of the agreement and that the Missouri Pacific Railroad Company had become obligated to terminate" his employment and seniority. Other facts in connection with this phase of the matter will be mentioned later. It does not appear that plaintiffs took any further steps prior to the filing of this suit on November 24, 1953.

Between October 29 and November 4, 1953, all of the plaintiffs, respectively, sent by registered mail to the Brotherhood $25 money orders with accompanying letters typewritten and identical in form (except that the last paragraph was lined out in ink on three or four of them) as follows: "Herewith find enclosed United States money order in the amount of $25.00, in compliance with Union Shop Agreement entered into January 12, 1953, between Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, and Brotherhood of Sleeping Car Porters, with reference to employees ostensibly represented by your organization.

"Kindly advise the monthly dues and assessments and same will be forwarded.

"You are further advised that this payment is being made under protest and I reserve any and all legal rights that I may have."

Very promptly, and from November 3-5, 1953, the Brotherhood returned the remittances by registered mail with letters stating that a decision had been rendered by the carrier that the respective employees had failed to comply with the provisions of Section 1 of the contract (the union shop membership requirement). This inter-

change occurred very shortly before the hearings before the neutral.

These plaintiffs had for years worked under collective bargaining agreements negotiated by the Brotherhood, although there had been considerable dissention among them with reference to their craft classification and representation. The record shows the filing by these plaintiffs (and perhaps others) of a prior suit in the Circuit Court of the City of St. Louis against the Missouri Pacific and various Railroad Brotherhoods alleging: a violation of their civil rights based on racial discriminations, and a conspiracy to that end; that they were in fact performing the services of brakemen and should be classified as such; and praying that their job rights and true classification be protected and that defendants be enjoined from exerting pressures to eliminate them from the operating services. The present Brotherhood defendant intervened in that case as the craft representative of the plaintiffs, alleging that the great majority of the Train Porters were members of it. By an amended petition the cause was later changed to one for damages only, and the suit is still pending. We merely mention this case in passing, because the proceedings therein by the defendant Brotherhood are urged as evidencing "hostility" on its part against the plaintiffs in the present litigation.

When the plaintiffs received the original notices of the execution of the union shop agreement they consulted counsel; they were advised to "go very slow" about joining the Brotherhood, as such action might prejudice their pending suit and because there was a question regarding the validity of the union shop agreement. By way of explanation of his subsequent action, one plaintiff stated: "I had a case pending in court and I wanted to test the strength of that case to see whether or not I had to join"; one or two others made similar statements. Their action in remitting initiation fees seven or eight months after the

original notice, with the letters already described, was also taken upon advice of counsel, and the letters were prepared by counsel. The evidence concerning the advice of counsel in the first instance was admitted on behalf of the plaintiffs on the theory that it tended to show their "good faith."

The facts may differ slightly as to certain individual plaintiffs, but since no separate contentions are briefed, the foregoing will suffice for all. On these facts plaintiffs alleged: that the defendants had acted arbitrarily and illegally in seeking to forfeit their rights, jobs and seniority, and in violation of the Railway Labor Act and of all due process requirements; that all such acts were malicious, and that plaintiffs had no adequate remedy at law or by administrative or statutory remedies; that plaintiffs "have exhausted all administrative remedies available to them * * *," and that an actual controversy existed as to the legality of the union shop contract. Plaintiffs prayed: for injunctions against their respective discharges and any interference with their "job rights"; that defendants also be enjoined from enforcing the contract against the plaintiffs, and from requiring them to join the Brotherhood; and for damages, $5,000 actual and $100,000 punitive, as to each plaintiff. It will not be necessary to digest the answers, for they are sufficient to make up the issues on the matters to be discussed. Such other facts as may be necessary will be referred to in the course of the opinion.

In this situation the trial court held, after taking the case under advisement, that it should be dismissed "for lack of jurisdiction," and judgment was entered accordingly. After their motion for new trial was overruled, plaintiffs duly appealed. A restraining order issued by the trial court has been continued in force.

It will be wholly impossible to state in this opinion or to follow, as such, all the points and subpoints raised here

by the appellants. Stated in substance, and as consolidated, they are: (1) that the court had jurisdiction to adjudicate the invalidity of the contract, it being directly attacked, and plaintiffs having no adequate administrative remedy; (2) that the union shop contract is void as to these plaintiffs, because not validly entered into as to them (without notice or opportunity to be heard) and because it is in violation of the statutory duty of the Brotherhood to act fairly and without discrimination as to all the employees it represents; (3) that the tenders made by plaintiffs before any actual, completed discharge, were legally good and should have been accepted, and that plaintiffs were actually denied membership "for reasons other than failure to tender" initiation fees and dues; (4) that the court had jurisdiction on general equitable principles to relieve against the forefeiture of discharge; (5) that the decision of the neutral was made out of time under the contract, and was, therefore, void; and (6) that all determinations under the contract should be and are subject to judicial review. The defendants assert generally: (a) that the case was properly dismissed for lack of jurisdiction because plaintiffs had not exhausted their Administrative remedies under the Railway Labor Act, and specifically because exclusive, primary jurisdiction in such matters is conferred by Congress upon the National Railway Adjustment Board; and (b) that no timely or sufficient offers to join or tenders were made by plaintiffs, and that defendant carrier was required under the contract to discharge them.

In the enactment of the Railway Labor Act (Title 45 U. S. C. A., §§ 151-163) Congress committed to the tribunals there created a vast responsibility in the handling of labor relations in that field, which, because of its peculiar and technical aspects and the occasional overlapping of crafts therein, is widely divergent from industry generally. (See, for instance, comments in Penn. RR. Co. v. Rychlik, 352 U. S. 480, 1 L. Ed. 2d 480.) By § 153 of

the Act the "National Railroad Adjustment Board" was created and its organization and operations outlined in detail; by paragraph (i) of that section it is provided that: "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." By §§ 154 and 155 the National Mediation Board was established, and its functions set forth.

By an amendment to this Act effective January 10, 1951 (§ 152) it was provided: "Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier, or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted . . .

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: **Provided**, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for

any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

As already noted, these plaintiffs pursued the procedure of hearings and appeals up to and including the decision of a neutral, all as provided in the union shop contract and as authorized by the Act, but they pursued the administrative remedies no further. Our first and primary question is one of jurisdiction. It is apparent that Congress has left only a minimum of responsibility (and jurisdiction) to the courts, State or Federal, in the field of railway labor relations. Order of Ry. Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318. In various matters basically involving jurisdictional disputes the courts have declined to interfere or take jurisdiction, even where it is claimed by an individual or minority group that the carrier and a Brotherhood are discriminating in job assignments, seniority, etc. Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795; Order of Ry. Conductors v. Pitney, supra; Spires v. Southern R. Co. (C. A. 4), 204 F. 2d 453; Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co. (C. A. 5), 199 F. 2d 384, cert. den. 345 U. S. 908, 97 L. Ed. 1344; Starke v. N. Y., Chi. & St. L. R. Co. (C. A. 7), 180 F. 2d 569; Missouri-Kansas-Texas et al. v. Randolph et al. (C. A. 8), 164 F. 2d 4, cert. den. 334 U. S. 818. In some of those cases the plaintiffs had gone through the preliminary administrative steps, as here, but had not presented their grievances to the Adjustment Board. The courts held in those cases that exclusive jurisdiction was conferred on the Board in such matters. In the Spires case the court held that the Board had exclusive jurisdiction although the employees claimed to have been treated unfairly by an agreement made by their bargaining agent. In Slocum, the court held that a state court had no jurisdiction to enter a declaratory judgment

and that the jurisdiction of the Board to adjust such grievances and disputes was exclusive. The courts have likewise declined jurisdiction in controversies involving union shop contracts, and specifically where the plaintiffs, belonging to a rival union, have protested the requirement that they must join the designated bargaining union or Brotherhood, and have sought reinstatement when discharged for failure to join. United R. R. Operating Crafts et al. v. Northern Pac. Ry. Co. et al. (C. A. 9), 208 F. 2d 135, cert. den. 347 U. S. 929, 98 L. Ed. 1081; U. R. O. C. (supra) v. Penn. RR. (C. A. 7), 212 F. 2d 938; U. R. O. C. et al. v. Wyer et al. (D. C. N. Y.), 115 F. Supp. 359, aff. (C. A. 7), 205 F. 2d 153, cert. den. 347 U. S. 929, 98 L. Ed. 1081; Alabaugh et al. v. B. & O. R. Co. et al. (C. A. 4), 222 F. 2d 861, cert. den. 350 U. S. 839, 100 L. Ed. 748; Pigott et al. v. Detroit T. & I. R. Co. et al. (D. C., Mich.), 116 F. Supp. 949, cert. den. 347 U. S. 944, 98 L. Ed. 1092. In those cases also, the courts have held: that primary jurisdiction rests in the Adjustment Board which, alone, is authorized to determine questions of plaintiffs' compliance or noncompliance with the contract and the application of the contract to them; and also, that such cases do not involve unequal representation or hostile discrimination by the bargaining representative (U. R. O. C. v. Penn. RR., supra). And such a controversy is said to be a grievance or dispute which Congress has relegated exclusively to the tribunals created under the Railway Labor Act (U. R. O. C. v. Nor. Pac. RR., supra), as a grievance "* * * arising in the performance of collective bargaining agreements * * *." In Wyer, supra, it was said that such a dispute involved "the interpretation or application of agreements concerning 'working conditions,'" within the meaning of § 153 (i) of the Act, and that "union security" was a condition which was the "subject of agreement." And see, also, the Pigott case, supra. The possibility of conflicts between court and administrative determinations is pointed out in Order of Ry. Conductors of Am. v.

Southern Ry. Co., 339 U. S. 255, 94 L. Ed. 811. And it has been held repeatedly that the fact that a collective bargaining agreement may have an unfavorable effect upon certain individuals or a minority of the employees represented does not invalidate it or give jurisdiction to the courts, where such are based upon differences relevant to the purposes of the contract. Lewellyn v. Fleming et al. (C. A. 10), 154 F. 2d 211, cert. den. 329 U. S. 715, 91 L. Ed. 620; Alabaugh et al. v. B. & O. R. Co. et al. (C. A. 4), 222 F. 2d 861, cert. den. 350 U. S. 839, 100 L. Ed. 748; Steele v. L. & N. R. Co., 323 U. S. 192, 203, 89 L. Ed. 173 (relied on strongly here by plaintiffs).

We note again at this point that the Brotherhood was, at all the times in question, duly and properly certified as the bargaining agent of these plaintiffs. It is universally held that the courts have nothing to do with the determination of the proper bargaining agent. Switchmen's Union of N. Am. et al. v. National Mediation Board et al., 320 U. S. 297, 88 L. Ed. 61; General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. R., 320 U. S. 323, 88 L. Ed. 76; United Transp. Serv. Employees v. National Mediation Board (App. D. C.), 179 F. 2d 446; Hunter et al. v. A., T. & S. F. Ry. et al. (C. A. 7), 171 F. 2d 594, cert. den. 337 U. S. 916, 93 L. Ed. 1726. The Brotherhood, as such, was given express authority by § 152 of the Act to negotiate and execute a union shop contract which would require all who were presently nonmembers to join within sixty days of its effective date. The exception permitted for those belonging to another labor organization "national in scope" was abandoned in this case in the amended petition, so we are not concerned with the exception. Generally speaking, when the accredited bargaining agent executes a union shop contract (or other collective bargaining agreement) it is binding on all employees in the bargaining unit, whether members of the union or not. Atlantic Coast

Line R. Co. v. Pope (C. A. 4), 119 F. 2d 39; Lewellyn v. Fleming et al. (C. A. 10), 154 F. 2d 211, cert. den. 329 U. S. 715, 91 L. Ed. 620; Elder v. N. Y. Cent. R. Co. (C. A. 6), 152 F. 2d 361.

Plaintiffs' counsel insist that the court had jurisdiction here because plaintiffs are attacking the validity of the contract. We might hold that they are not, in fact, actually attacking its validity, but merely its application to them; but, since it may conceivably be said that they are attacking its validity **as to them**, we will discuss the question. They say that the contract was negotiated and executed without notice to them or any opportunity to be heard on the question. We find no requirement in the act or in the cases of such a notice to individuals. In McMullans v. Kan.-Okla. & Gulf Ry., Inc., et al. (C. A. 10), 229 F. 2d 50, cert. den. 351 U. S. 918, 100 L. Ed. 1450, it was held that notice to individual complaining conductors was not required when their bargaining agent and the carrier so amended the existing contract as to provide for compulsory retirement at age 70. In Estes et al. v. Union Terminal Co. (C. A. 5), 89 F. 2d 768, and Hunter et al. v. A., T. & S. F. Ry. et al. (C. A. 7), 171 F. 2d 594, cert. den. 337 U. S. 916, 93 L. Ed. 1726, cited by plaintiffs, the notices which those courts held should have been given were notices required to be given by the Adjustment Board itself under the very terms of the Act, and the cases involved Adjustment Board hearings.

The courts cannot write a requirement of notice into the Act, and so far as we can see none was required under the present circumstances. The record also indicates that, while the negotiations and proposed contract were discussed at business meetings of the Brotherhood, no vote was necessary (or taken) because the National Convention of the last previous year had instructed that a union shop contract be negotiated with the Missouri Pacific. Under these circumstances it would be the rankest speculation to

say that notice to these plaintiffs would have been of any benefit to them. The circumstances in Steele v. L. & N. R. R. Co., 323 U. S. 192, 89 L. Ed. 173, distinguish it from the present case, as will appear later. Elgin, Joliet & Eastern Ry. Co. v. Burley et al., 325 U. S. 711, 89 L. Ed. 1886, involved the authority of a union to compromise, without notice, individual claims for accrued back pay or penalties, a matter which the court was careful to distinguish from those matters involving the creation or amendment of collective bargaining agreements, and from the making of an agreement settling for the future the meaning of an existing agreement under which a dispute had arisen; disputes of the latter types were held to be within the power and authority of the bargaining agent, under the terms of the Act, and the carrier may safely deal with the union on that basis (Elgin, supra, l. c. 739-740). Certainly our present case, in which the plaintiffs seek continued future employment by virtue of injunctions and court orders, involves the future relations between these parties and the carrier, and it may indirectly involve, perhaps, the future relations of other employees. This case does not involve merely past individual grievances. We hold that the contract was not invalidated as to these plaintiffs by the failure to give them notice.

Plaintiffs cite in this connection, and rely greatly upon the following cases: Steele v. L. & N. R. R. Co., 323 U. S. 192, 89 L. Ed. 173; Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U. S. 232, 94 L. Ed. 22; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210, 89 L. Ed. 187; Brotherhood of R. R. Trainmen et al. v. Howard et al., 343 U. S. 768, 96 L. Ed. 1283; Rolax et al. v. Atlantic Coast Line R. Co. et al. (C. A. 4), 186 F. 2d 473; Mount v. The Grand Int. Brotherhood of Locomotive Engineers (C. A. 6), 226 F. 2d 604, cert. den. 350 U. S. 967, 100 L. Ed. 839; Dillard v. Chesapeake & O. R. Co. et al. (C. A. 4), 199 F. 2d 948; Richard-

son et al. v. Texas & N. O. R. Co. (C. A. 5), 242 F. 2d 230; Central Ga. Ry. Co. v. Culpepper et al., 209 Ga. 844, 76 S. E. 2d 482; Brotherhood of R. R. Trainmen et al. v. Luckie et al. (Tex. Civ. App.), 286 S. W. 2d 712; Lamon v. Ga. Southern & Florida Ry. Co., 212 Ga. 63, 90 S. E. 2d 658. It is urged that the effect of these cases establishes such a discrimination here as to invalidate the present contract, at least as applied to these plaintiffs. The general effect of those cases is that the Act contemplates that the bargaining agent must act fairly as to all the employees whom it represents, so as not to sacrifice, discriminatorily, the rights of a minority; that, however, it may make valid distinctions where relevant to the purposes of the contract (Steele, l. c. 203). As pointed out by Judge Parker in the Alabaugh case (222 F. 2d, l. c. 866) the Steele, Tunstall and Howard cases involved discriminations made solely on account of race, matters which did not involve "collective bargaining." To that group of three cases may be added also the Dillard, Rolax and Richardson cases, supra, and the very recent case (not cited) of Conley et al. v. Gibson et al., ... U. S. ..., decided at the October Term, 1957. In this group of cases, generally, various actions were taken by the unions which either displaced negroes from their jobs or relegated them to inferior positions solely on account of their race, and without any option or discretion allowed to them by which the result might be obviated; and in some of the cases the complaining parties were wholly prohibited from joining the offending union on account of their race. While it is impossible to discuss those cases individually, it was, and is, obvious that in all of them the distinctions made were not **relevant to the purposes** of the bargaining agreement. The courts found their jurisdiction in the terms and purposes of the Railway Labor Act, which they held to be violated, and, perhaps, from constitutional rights and restrictions also. There is no contention whatever here that the acts of which plaintiffs now complain were motivated

by racial considerations. Counsel say that the language of these cases goes further than a mere condemnation of racial discriminations; perhaps so, but the condemnations certainly seem to be confined to distinctions and discriminations which are not "* * * relevant to the authorized purposes of the contract * * *." (Steele, 323 U. S., l. c. 203.) The distinction between those cases and one where the plaintiffs are merely required, by the contract and the express authorization of Congress, to join the Brotherhood within sixty days (though actually extended here) as a requirement of continued employment, is obvious. In Lamón and Luckie, supra, the courts held that they could determine the validity of a contract amendment or directive of the union. We have determined here that the issues raised do not invalidate the present contract. The Mount and Culpepper cases, supra, are sufficiently distinguishable upon their facts that they are not persuasive here.

Counsel also cite a small group of cases in which the courts have indicated that they would, in some circumstances, accept jurisdiction of an action at law for damages on account of a completed wrongful discharge. Transcontinental & Western Air, Inc., v. Koppal, 345 U. S. 653, 97 L. Ed. 1325; Donahoo v. Thompson, Trustee, Mo., 291 S. W. 2d 70, cert. den. 352 U. S. 941, 1 L. Ed. 2d 236; Moore v. Ill. Cent. R. R. Co., 312 U. S. 630, 85 L. Ed. 1089. As indicated in Slocum (339 U. S. 239) such is only true when the employee has accepted the discharge as final, has ceased to be or claim to be an employee, and files his suit for damages only. Those cases involve no possible question of future relations. See Broady v. Ill. Cent. R. R. (C. A. 7), 191 F. 2d 73. That is certainly not the situation here where the plaintiffs, in effect, seek reinstatement and continued employment. Also, in Missouri, the employee is required to exhaust his administrative remedies (Koppal and Donahoo, supra) before seeking relief in the courts. A mere prayer for damages cannot change the character

of the suit so as to give the courts jurisdiction. See U. R. O. C. et al. v. Wyer et al. (D. C. N. Y.), 115 F. Supp. 359, affirmed 205 F. 2d 153, cert. den. 347 U. S. 929, 98 L. Ed. 1081; Brock v. Brotherhood of Sleeping Car Porters, etc. (D. C. La.), 129 F. Supp. 849, 100 L. Ed. 1139. The court said, in the Wyer case, at 115 F. Supp., l. c. 365: "* * * and it is a fantastic thought that every employee who is discharged under a union shop agreement can run to Court about it."

So far as concerns any claimed right to be represented by counsel at the hearings before officials of the carrier, neither the Act nor the contract gives such a right. The Act does confer that right in hearings before the Adjustment Board. The initial hearings are informal; no plaintiff claimed that he was prevented from telling his full story. This action did not constitute a denial of due process. Broady v. Ill. Cent. R. R. (C. A. 7), 191 F. 2d 73. Nor does it otherwise give the courts jurisdiction. See, also, as ruling this question: Butler v. Thompson et al. (C. A. 8), 192 F. 2d 831, 832; Roberts v. Thompson (D. C. Ark.), 107 F. Supp. 775, 776.

Plaintiffs insist that they have no adequate administrative remedy, citing certain sections of the Act, the Steele case, supra, and two cases which deal merely in generalities on wholly dissimilar facts. The basic argument here is that the Adjustment Board consists of members chosen equally from the Brotherhoods and the carriers and that in no event could these plaintiffs get a fair and impartial hearing. We may not confer jurisdiction upon our courts by speculating upon the attitude, composition, or probable findings of that Board. A similar argument was made and denied in State ex rel. St. L.-S. F. Ry. v. Russell, 358 Mo. 1136, 219 S. W. 2d 340. See, also: Atabaugh et al. v. B. & O. R. R. (C. A. 4), 222 F. 2d 861; Johns v. B. & O. R. Co. (D. C. Ill.), 118 F. Supp. 317, affirmed 347 U. S. 964, 98 L. Ed. 1107; U. R. O. C. v. Penn. R. R. Co. (C. A. 7),

212 F. 2d 938; Missouri-Kansas-Texas R. R. v. Randolph (C. A. 8), 164 F. 2d 4, cert. den. 334 U. S. 818. We cannot presume prejudice or bias in a congressionally created tribunal. And the plaintiffs may, in person or by attorney, present their own grievances to the Adjustment Board, if the Brotherhood is unwilling to do so. Spires v. Southern Ry. (C. A. 4), 204 F. 2d 453; Starke v. N. Y., Chi. & St. L. R. Co. (C. A. 7), 180 F. 2d 569. The Board has the power to order reinstatement as well as to grant money awards. Order of Ry. Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318. Many of the cited cases hold that the courts may not assume jurisdiction when the complaining parties have not exhausted their administrative remedies. Alabaugh et al. v. B. & O. R. R. (C. A. 4), 222 F. 2d 861, cert. den. 350 U. S. 839; Johns v. B. & O. R. Co. (D. C. Ill.), 118 F. Supp. 317, affirmed 347 U. S. 964, 98 L. Ed. 1107; Spires, supra; Slocum v. Delaware L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795; Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co. (C. A. 5), 199 F. 2d 384, cert. den. 345 U. S. 908, 97 L. Ed. 1344; Bell v. Western Ry. of Ala., 228 Ala. 328, 153 So. 434; Donahoo v. Thompson, Mo., 291 S. W. 2d 70, cert. den. 352 U. S. 941, 1 L. Ed. 2d 237. In fact, substantially every decision in which the court has declined jurisdiction has been based upon the holding that jurisdiction was relegated by Congress to the administrative agencies, which is merely another way of saying the same thing. The Alabaugh case involved a union shop agreement and the contemplated discharge of certain members of "U. R. O. C." because they had declined and failed to join the certified bargaining agent when required. They had pursued the administrative procedure before officials of the carrier, as was done here. In their suit to enjoin the discharge they alleged discrimination on the part of the Brotherhood in refusing to reinstate them upon request. Their suit was dismissed, the court holding that they were required to exhaust administrative remedies before the Adjustment

Board "which has been given by Congress primary original jurisdiction over controversies of this sort. * * *" The court further said, l. c. 864: "The case here involves the rights of employees under a union shop agreement arrived at by collective bargaining. The interpretation of that agreement and the rights and grievances of employees thereunder are just the sort of matters that Congress intended to be handled in the first instance by the National Railroad Adjustment Board." The court there discussed various cases, many of which we have discussed or cited here; and it expressly distinguished that group of cases involving discriminations based on race. Counsel here seek to distinguish the Alabaugh case on its facts and issues; there are differences, of course, but its basic holding (and that of many of the other cases discussed) is applicable here; it is true that no issue of the validity of the contract was expressly raised there, but, we have ruled that question here, independent of the Alabaugh decision. Space does not permit us to discuss the various other asserted distinctions, but they have been considered.

The point made that the "tender" of plaintiffs, made before completed discharge, was sufficient and that they were, in fact, denied membership in the Brotherhood for other reasons, is a matter which must be considered in administrative proceedings. The same is true of the contention that the decision of the "neutral" was void because not rendered within the time required by the contract. These are matters directly concerning the interpretation of the contract provisions and its application to these plaintiffs; they require the consideration of evidence, and they certainly constitute the type of disputes which are expressly delegated to the Board.

The contention that the court has the power, on general equitable principles, to enjoin the forfeitures of discharge, really adds nothing to the contentions already discussed.

If the court does not have **jurisdiction**, because of a controlling Act of Congress, it cannot act on the merits on any principles, legal or equitable. In fact, many of the cases already discussed in which jurisdiction was declined, were cases in equity where the complainants sought to enjoin a discharge or to attain reinstatement. This is certainly not a situation where a contract is void and unenforceable on its face. The contention cannot be sustained.

The constitutionality of the 1951 union shop amendment to the Act has been considered and upheld. Ry. Empl. Dept., A. F. L., et al. v. Hanson et al., 351 U. S. 225, 100 L. Ed. 1112; Otten v. Staten Island Rapid Transit Ry. (C. A. 2), 229 F. 2d 919, cert. den. 351 U. S. 983, 100 L. Ed. 1497. And see the general discussion in Penn. R. R. Co. v. Rychlik, 352 U. S. 480, 1 L. Ed. 2d 480. Counsel have also urged that the Brotherhood, in and by this contract, wrongfully bargained away other rights of employees, such as the elimination of certain provisions of the existing "Rules and Working Conditions Agreement" in all cases arising under the union shop provisions. These things are not involved on our facts and it would be wholly inappropriate for us to consider or rule the contention. We cannot search this contract from end to end for some abstract "illegality."

Finally, counsel urge that all administrative determinations under the union shop contract should be subject to judicial review, because plaintiffs' property rights have been affected. The simple answer to that argument is that plaintiffs have not fully exhausted their administrative remedies and there is no Board decision which could be reviewed. We note, in passing, that at least a serious doubt arises from the cases as to whether any such right of review exists. Switchmen's Union of N. Am. et al. v. National Mediation Board et al., 320 U. S. 297, 88 L. Ed. 61; United Transp. Serv. Employees v. National Mediation Board (App. D. C.), 179 F. 2d 446; Penn. R. R. Co. v.

Rychlik, 352 U. S. 480, 1 L. Ed. 2d 480. The mere fact, urged by counsel, that certain provisions of the contract seem to contemplate possible court action, cannot create jurisdiction in the courts, by way of review or otherwise. The parties may not by agreement foreclose the jurisdiction of the courts, it is true, but neither may they create it.

Having determined that the contract was not invalid, and that neither the trial court nor this court had or has any jurisdiction to proceed beyond that determination, the order and judgment of dismissal for lack of jurisdiction is affirmed.

.....

Henry I. Eager, Judge.

All concur.

Circuit Court's Memorandum Opinion and Judgment.

On March 29, 1956 the Circuit Court of the City of St. Louis entered of record the following Memorandum Opinion and Judgment (omitting caption):

Memorandum Opinion and Judgment.

Though the Court appreciates plaintiff's situation, the arguments of their counsel as to the invalidity of the contract involved, and Mr. Roses's position in his article in the January, 1956, American Bar Association Journal, a careful reading of the authorities, particularly Alabaugh v. Baltimore & Ohio Railroad Company, 222 Federal 2d 861, compels the Court to the conclusion that plaintiff's claim should be dismissed for lack of jurisdiction, in accordance with the prayers of defendants' answers.

Claim dismissed for lack of jurisdiction. Restraining order to remain in force and effect until time for filing a motion for a new trial has expired, or, if such motion is filed, until such motion is ruled.

Ivan Lee Holt, Jr.,
Judge.

Judgment of the Supreme Court of Missouri.

(Caption Omitted.)

"Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellants their costs and charges herein expended and have therefor execution. (Opinion filed.)

Extract From Constitution of the United States.

V. Amendment.

" . . . nor shall any person be deprived of life, liberty, or property, without due process of law; . . . "

Extract From Railway Labor Act, 45 U. S. C., Ch. 8.

"Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: **Provided**, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the

same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

Section 153 (i), Railway Labor Act, Title 45, 153 U. S. C. A.

(i) "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 527.010 of the Declaratory Judgment Act of Missouri.

Declaratory Judgments.

527.010. Scope.—The circuit courts and courts of common pleas of this state, within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Amended Petition.

Now come the plaintiffs and for cause of action state as follows:

1. Plaintiffs are citizens of the United States and employees of the Missouri Pacific Railroad Company engaged in train service performing head-end braking and other duties on passenger trains operated in interstate commerce by said Missouri Pacific Railroad Company and are now known for collective bargaining purposes as "train porters," although the vast majority of their duties consists of head-end braking. Each of said plaintiffs has vested seniority rights beginning with the dates set forth below after each of their names:

Leland R. Cook	July 8, 1937
Lonnie Geigers	December 17, 1942
Kelly May	February 15, 1943
A. L. McDonald	August 31, 1919
J. O. McDonald	November 22, 1911
Isom McMoore	December 14, 1942
Curtis G. Neal	July 7, 1943
Rufus Pettis	April 28, 1913
John F. Price	June 24, 1923
James Ritchie	August 3, 1926
Ira Saville	September 8, 1907
Hopson Wilson	May 16, 1945
I. B. Woods	December 5, 1940
Theodore Wright	November 13, 1945

2. The Brotherhood of Sleeping Car Porters (hereinafter sometimes called the Brotherhood) is an unincorporated labor organization, national in scope, and has thousands of individual members throughout the United States. It is impracticable to bring all of the individual members before the Court but their interests and the interests of the Brotherhood are fairly and adequately represented by

the Brotherhood and the defendant, T. D. McNeal, named herein. The Brotherhood is the collective bargaining representative under the Railway Labor Act (United States Code, Title 45, Sections 151 et seq.) of that craft or class of employees of the Missouri Pacific Railroad Company known as "train porters" and by virtue of that position is the collective bargaining representative under the Railway Labor Act of plaintiffs. Plaintiffs are not members of the Brotherhood and at no time material hereto have any of them been members of the Brotherhood.

3. Defendant, T. D. McNeal, is the duly elected, qualified and acting Third International Vice President of the Brotherhood and acts for the Brotherhood in connection with its business as a labor union and representative under the Railway Labor Act of the craft or class of "train porters" employed by the Missouri Pacific Railroad Company. He resides and maintains offices in the City of St. Louis, Missouri, within the jurisdiction of this Court. Said defendant, T. D. McNeal, adequately represents the Brotherhood and all of its members and is sued herein as the representative of the Brotherhood and of all of the members thereof.

4. Guy A. Thompson is the duly appointed Trustee for the Missouri Pacific Railroad Company, Debtor, having been so appointed by the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri. The Missouri Pacific Railroad Company is a corporation organized under the laws of Missouri with its principal place of business at St. Louis. It is an interstate carrier engaged in the transportation of passengers and freight in interstate commerce by rail.

5. That on or about January 31, 1951, the defendant Brotherhood, without authorization from plaintiffs and without giving plaintiffs any notice or opportunity to be heard, requested the defendant Missouri Pacific Railroad

Company to negotiate with the Brotherhood a contract for the application of the Railway Union Shop Law (United States Code, Title 45, Section 152-11th) to cover employees under the collective bargaining contract existing between the Brotherhood and said Missouri Pacific Railroad Company.

6. On or about March 9, 1953, the defendant Missouri Pacific Railroad Company and the Brotherhood purportedly on behalf of these plaintiffs and all other employees represented for collective bargaining purposes by the Brotherhood, entered into an agreement, providing as follows:

> "It is agreed that the provisions of an agreement made January 12, 1953, between Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, and certain organizations represented by the Employes' National Conference Committee, Seventeen Cooperating Railway Labor Organizations, in settlement of the request of February 5, 1951, made by such organizations for union shop and check-off are adopted as an agreement between Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, International Great-Northern Railroad Company, Debtor, San Antonio, Uvalde and Gulf Railroad Company, Debtor, and the employees thereof represented by the Brotherhood of Sleeping Car Porters in full and final disposition of notice served under Section 6 of the Railway Labor Act by the Brotherhood of Sleeping Car Porters under date of January 31, 1951, for a union shop agreement.
>
> This agreement to become effective April 1, 1953." (A copy of said agreement in full is attached as Exhibit 1 to the original Complaint filed in this cause and incorporated herein by reference.)*

* Said Exhibit is reproduced in this appendix following this Petition.

The agreement of January 12, 1953, which purportedly was adopted by the defendants on March 9, 1953, provided, among other things, as follows:

> "Section 1. In accordance with and subject to the terms and conditions hereinafter set forth, all employees of the carrier now or hereafter subject to the rules and working conditions agreements between the parties hereto, except as hereinafter provided, shall, as a condition of their continued employment subject to such agreements, become members of the organization party to this agreement representing their craft or class within sixty calendar days of the date they first performed compensated service as such employes after the effective date of this agreement, and thereafter shall maintain membership in such organization; except that such membership shall not be required of any individual until he has performed compensated service on thirty days within a period of twelve consecutive calendar months. Nothing in this agreement shall alter, enlarge or otherwise change the coverage of the present or future rules and working conditions agreements." (A copy of said agreement in full is attached as Exhibit 2 to the original Complaint filed in this cause and incorporated herein by reference.)*

The plaintiffs allege that at no time have they or either of them authorized the Brotherhood to enter into on their behalf either of the alleged agreements hereinbefore mentioned, and further that the Railway Labor Act, as amended, and specifically Section 2-Eleventh thereof (United States Code, Title 45, Section 152-11th), did not authorize the employees of defendant railroad to enter into said agreements and did not authorize the Brotherhood to make said agreements on behalf of these plaintiffs; nor did it authorize the defendant railroad com-

* Said Exhibit is reproduced in this Appendix following this Petition.

pany to enter into such agreements with its employees. Nevertheless, the defendant Brotherhood without notice to these plaintiffs and without giving them any opportunity to be heard entered into said agreement purportedly on their behalf and used its position as collective bargaining representative under the Railway Labor Act to unlawfully interfere with plaintiffs' employment rights, in violation of the Railway Labor Act and the Constitution and the laws of the State of Missouri and the United States.

7. After the effective date of said alleged agreement and subsequent to June 1, 1953, the Brotherhood unlawfully and in violation of the Railway Labor Act notified the Missouri Pacific Railroad Company that plaintiffs had failed to join the Brotherhood within sixty calendar days after the effective date of the alleged agreement of March 9, 1953, and thus set in motion the machinery provided for in said alleged agreement for the dismissal of plaintiffs from their employment with the Missouri Pacific Railroad. Upon receiving notice of said action by the Brotherhood, plaintiffs severally requested hearings before their employer. Times and places were set for such hearings and each plaintiff was present for his particular hearing accompanied by his counsel. The defendants, however, refused to permit plaintiffs' counsel to participate in the hearings and in some circumstances even refused plaintiffs' counsel permission to remain in the room where said hearings were being held. After each of the hearings the Missouri Pacific Railroad Company informed the employees involved in said hearing that the carrier found that he was in non-compliance with said agreement and was being dismissed from the service for his failure to comply. Thereafter, each plaintiff appealed to the highest operating officer designated to handle such appeals and in each case said officer, without further hearing, sustained the original action of the carrier. Plaintiffs there-

upon requested the appointment of a Neutral and when the parties were unable to agree upon a Neutral the defendants requested the National Mediation Board to appoint such Neutral. A Neutral was appointed and he held hearings in St. Louis, Missouri, on November 9, 10, and 11, 1953, and on November 17, 1953; said Neutral notified each of the plaintiffs, by registered mail, that he had failed to comply with the terms and conditions of said agreement, and that the Missouri Pacific Railroad Company has become obligated under said alleged agreement to terminate his employment and seniority. Plaintiffs allege further that the Finding of said Neutral is illegal and void in that the provision for the appointment of such Neutral is a part of the void contract herein complained of and, further, that even if said contract were legal the decision of the Neutral is void because it was not rendered within thirty calendar days from the date of receipt of the request for his appointment as provided for in the alleged contract.

8. Plaintiffs further aver that subsequent to the sixty day period mentioned in said alleged agreement but prior to the hearings before the above-mentioned Neutral, and at the hearings at which plaintiffs were denied the assistance and advice of counsel, the defendant Brotherhood waived the sixty day time limit provided for in said agreement and offered to accept plaintiffs' memberships in said Brotherhood. Plaintiffs at first declined to join the Brotherhood but subsequent thereto, and after consultation with their counsel plaintiffs tendered to the Brotherhood the uniform initiation fees and dues required for membership in the Brotherhood, but said defendant maliciously refused to accept their initiation fees; refunded their money, and denied them membership in the union.

9. Plaintiffs allege that at all times material to this case the defendant Brotherhood has aligned itself against

the interests of these plaintiffs and all of the defendants have deliberately and arbitrarily refused to consider whether plaintiffs have any justification for their failure to join the Brotherhood and have asserted that the fact alone that they did not join within sixty calendar days of the date they first performed compensated service after the effective date of said alleged agreement, has caused them to forfeit all of their seniority and employment rights with the Missouri Pacific Railroad Company. Plaintiffs allege that this arbitrary refusal by these defendants to consider any justification for failure to comply with the requirements of the alleged contract and the decision to discharge plaintiffs from their employment for such failure constitutes a violation of the Railway Labor Act, as amended; a denial of due process under the Fifth Amendment of the Constitution of the United States; is a deprivation of property without due process of law and a denial of the liberty of choice of the plaintiffs under the statutes and laws of the United States.

10. Plaintiffs allege that when the Missouri Pacific Railroad Company entered into the alleged contract herein complained of it violated the Railway Labor Act. Plaintiffs further allege that the participation of the Missouri Pacific Railroad Company with the Brotherhood in its attempts to compel plaintiffs to join the Brotherhood and its attempts to bring about the discharge of plaintiffs pursuant to said void contract constitutes interference by the carrier with organization of its employees; use of the funds of the carrier in maintaining and assisting a labor organization, and an effort to influence and coerce these plaintiffs into joining and remaining members of a labor organization—all of which conduct is prohibited by the Railway Labor Act, as amended.

11. As a result of the malicious and illegal acts of the defendants described in this Petition, plaintiffs' seniority, disability and retirement rights and their means of liveli-

hood are threatened with imminent destruction; plaintiffs' rights under the Railway Labor Act, as amended, and under the Constitutions and laws of the United States and the State of Missouri have been violated and denied; plaintiffs have been forced to lose time from their employment in order to protect their rights, with consequent loss of income, and they have been required to expend other large sums in the vindication of their rights. These acts and practices of the defendants are malicious and continuing. Because of them, plaintiffs are threatened with immediate loss of their jobs and livelihood, and unless this Honorable Court grants relief, plaintiffs will continue to be injured by the illegal acts of the defendants; the defendants will continue to violate plaintiffs' rights, and these plaintiffs will suffer irreparable damage for which there is no adequate remedy at law. Plaintiffs are without adequate administrative or statutory remedy; they have exhausted all administrative remedies available to them and only a Court of Equity can determine the legality of said alleged agreement and protect the rights of these plaintiffs.

12. Plaintiffs allege that there exists an actual claim or controversy between plaintiffs on one side and defendants on the other side as to whether the Railway Labor Act, as amended, authorizes the alleged agreement of March 9, 1953, and as to whether under the circumstances alleged in this Complaint plaintiffs may be required under the Railway Labor Act to join the Brotherhood as a condition of their continued employment with the Missouri Pacific Railroad Company. The interests of each side are adverse to the other.

Wherefore, plaintiffs pray:

1. For a temporary restraining order restraining the defendants, Guy A. Thompson, Trustee, and the Missouri Pacific Railroad Company, from dismissing plaintiffs from

their employment or taking away from them their presently assigned tasks pursuant to said alleged agreement of March 9, 1953, or interfering with them in any way in their job rights.

2. For a temporary injunction enjoining the defendants, Guy A. Thompson, Trustee, and the Missouri Pacific Railroad Company, from dismissing plaintiffs from their jobs under the terms of the alleged agreement of March 9, 1953, pending a final determination of this cause.

3. For a temporary injunction enjoining the defendant, Brotherhood of Sleeping Car Porters, its officers, agents and employees, from pressing or otherwise enforcing said agreement of March 9, 1953, pending a final determination of this cause.

4. That the defendants, each of them and all persons acting in concert with them be enjoined from enforcing said agreement of March 9, 1953, against these plaintiffs and from taking any further steps thereunder to cause or bring about the dismissal of these employees from their employment with the Missouri Pacific Railroad Company, because of said agreement.

5. That the Brotherhood of Sleeping Car Porters, its officers, agents, servants, employees, members and all persons in concert therewith, be enjoined permanently from using the Brotherhood's position as collective bargaining representative under the Railway Labor Act to unlawfully invade the employment rights of these plaintiffs and from entering into any agreement on their behalf requiring them to join the Brotherhood of Sleeping Car Porters as a condition of their continued employment with the Missouri Pacific Railroad Company.

6. For a declaratory judgment that the agreement of March 9, 1953, is unauthorized by the Railway Labor Act, as amended, and is, therefore, null and void.

7 For declaratory judgment that the Brotherhood of Sleeping Car Porters has denied them membership in said Brotherhood for reasons other than failure of the plaintiffs to tender their periodic dues, initiation fees, and assessments uniformly required as a condition of acquiring membership and that under Section 2-11th (c) of the Railway Labor Act, United States Code, Title 45, Section 152-Eleventh (c) they may not now be required to join said Brotherhood as a condition of their continued employment with the Missouri Pacific Railroad Company.

8. For compensatory damages against the defendants in the amount of $5,000.00 each and punitive damages against the Brotherhood of Sleeping Car Porters in the amount of $100,000.00 each.

9. For reasonable attorneys' fees and costs.

10. And for such other and further relief as to the Court may seem just and proper.

/s/ Joseph C. Waddy,
615 F Street Northwest,
Washington, D. C.,

Victor Packman,
1096 Arcade Building,
St. Louis, Missouri,

Henry D. Espy,
2103a Market Street,
St. Louis, Missouri,

Attorneys for Plaintiff.

Exhibit 1.

Memorandum Agreement.

It is agreed that the provisions of an agreement made January 12, 1953, between Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, and certain organ-

izations represented by the Employes' National Conference Committee, Seventeen Cooperating Railway Labor Organizations, in settlement of request of February 5, 1951, made by such organizations for union shop and check-off, are adopted as an agreement between Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, International-Great Northern Railroad Company, Debtor, San Antonio, Uvalde & Gulf Railroad Company, Debtor, and the employes thereof represented by the Brotherhood of Sleeping Car Porters in full and final disposition of notice served under Section 6 of the Railway Labor Act by the Brotherhood of Sleeping Car Porters under date of January 31, 1951 for a union shop agreement.

This agreement to become effective April 1, 1953.

Signed at St. Louis, Missouri, this 9th day of March, 1953.

Guy A. Thompson, Trustee
Missouri Pacific Railroad
Company, Debtor
International-Great Northern
Railroad Company, Debtor
San Antonio, Uvalde & Gulf
Railroad Company, Debtor:
By T. Short
Chief Personnel Officer

Brotherhood of Sleeping Car Porters:

Robert Gill
General Chairman
William Fields
General Chairman
T. D. McNeal
International Vice President
For A. Philip Randolph, International President

Exhibit 2.

Agreement.

This Agreement made this 12th day of January, 1953, by and between Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, and the employes thereof represented by the Railway Labor Organizations signatory hereto, through the Employes' National Conference Committee, Seventeen Cooperating Railway Labor Organizations, witnesseth:

It Is Agreed:

Section 1. In accordance with and subject to the terms and conditions hereinafter set forth, all employes of the carrier now or hereafter subject to the rules and working conditions agreements between the parties, hereto, except as hereinafter provided, shall, as a condition of their continued employment subject to such agreements, become members of the organization party to this agreement representing their craft or class within sixty calendar days of the date they first perform compensated service as such employes after the effective date of this agreement, and thereafter shall maintain membership in such organization; except that such membership shall not be required of any individual until he has performed compensated service on thirty days within a period of twelve consecutive calendar months. Nothing in this agreement shall alter, enlarge or otherwise change the coverage of the present or future rules and working conditions agreements.

Section 2. This agreement shall not apply to employes while occupying positions which are excepted from the bulletining and displacement rules of the individual agreements, but this provision shall not include employes who are subordinate to and report to other employes who are covered by this agreement. However, such excepted em-

ployes are free to be members of the organization at their option.

Section 3. (a) Employes who retain seniority under the Rules and Working Conditions Agreements governing their calls or craft and who are regularly assigned or transferred to full time employment not covered by such agreements, or who, for a period of thirty days or more, are (1) furloughed on account of force reduction, or (2) on leave of absence, or (3) absent on account of sickness or disability, will not be required to maintain membership as provided in Section 1 of this agreement so long as they remain in such other employment, or furloughed or absent as herein provided, but they may do so at their option. Should such employes return to any service covered by the said Rules and Working Conditions Agreements and continue therein thirty calendar days or more, irrespective of the number of days actually worked during that period, they shall, as a condition of their continued employment subject to such agreements, be required to become and remain members of the organization representing their class or craft within thirty-five calendar days from date of their return to such service.

(b) The seniority status and rights of employes furloughed to serve in the Armed Forces or granted leaves of absence to engage in studies under an educational aid program sponsored by the federal government or a state government for the benefit of ex-service men shall not be terminated by reason of any of the provisions of this agreement but such employes shall, upon resumption of employment, be considered as new employes for the purpose of applying this agreement.

(c) Employes who retain seniority under the rules and working conditions agreements governing their class or craft and who, for reasons other than those specified in subsections (a) and (b) of this section, are not in service

covered by such agreements, or leave such service, will not be required to maintain membership as provided in Section 1 of this agreement so long as they are not in service covered by such agreements, but they may do so at their option. Should such employes return to any service covered by the said rules and working conditions agreements they shall, as a condition of their continued employment, be required, from the date of return to such service, to become and remain members in the organization representing their class or craft.

(d) Employes who retain seniority under the rules and working conditions agreements of their class or craft, who are members of an organization signatory hereto representing that class or craft and who in accordance with the rules and working conditions agreement of that class or craft temporarily perform work in another class of service shall not be required to be members of another organization party hereto whose agreement covers the other class of service until the date the employes hold regularly assigned positions within the scope of the agreement covering such other class of service.

Section 4. Nothing in this agreement shall require an employe to become or to remain a member of the organization if such membership is not available to such employe upon the same terms and conditions as are generally applicable to any other member, or if the membership of such employe is denied or terminated for any reason other than the failure of the employe to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. For purposes of this agreement, dues, fees, and assessments, shall be deemed to be "Uniformly required" if they are required of all employes in the same status at the same time in the same organizational unit.

Section 5. (a) Each employe covered by the provisions of this agreement shall be considered by the carrier to have met the requirements of the agreement unless and until the carrier is advised to the contrary in writing by the organization. The organization will notify the carrier in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt, of any employe who it is alleged has failed to comply with the terms of this agreement and who the organization therefore claims is not entitled to continue in employment subject to the Rules and Working Conditions Agreement. The form of notice to be used shall be agreed upon by the carrier and the organizations and the form shall make provision for specifying the reasons for the allegation of non-compliance. Upon receipt of such notice, the carrier will, within ten calendar days of such receipt, so notify the employe concerned in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt. Copy of such notice to the employe shall be given the organization. An employe so notified who disputes the fact that he has failed to comply with the terms of this agreement, shall within a period of ten calendar days from the date of receipt of such notice, request the carrier in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt to accord him a hearing. Upon receipt of such request the carrier shall set a date for hearing which shall be held within ten calendar days of the date of receipt of request therefor. Notice of the date set for hearing shall be promptly given the employe in writing with copy to the organization, by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt. A representative of the organization shall attend and participate in the hearing. The receipt by the carrier of a request for a hearing shall operate to stay action on the termination of employment until the hearing is held and the decision of the carrier is rendered.

In the event the employe concerned does not request a hearing as provided herein, the carrier shall proceed to terminate his seniority and employment under the Rules and Working Conditions Agreement not later than thirty calendar days from receipt of the above described notice from the organization, unless the carrier and the organization agree otherwise in writing.

(b) The carrier shall determine on the basis of the evidence produced at the hearing whether or not the employe has complied with the terms of this agreement and shall render a decision within twenty calendar days from the date that the hearing is closed, and the employe and the organization shall be promptly advised thereof in writing by Registered Mail, Return Receipt Requested.

If the decision is that the employe has not complied with the terms of this agreement, his seniority and employment under the Rules and Working Conditions Agreement shall be terminated within twenty calendar days of the date of said decision except as hereinafter provided or unless the carrier and the organization agree otherwise in writing.

If the decision is not satisfactory to the employe or to the organization it may be appealed in writing, by Registered Mail, Return Receipt Requested, directly to the highest officer of the carrier designated to handle appeals under this agreement. Such appeals must be received by such officer within ten calendar days of the date of the decision appealed from and shall operate to stay action on the termination of seniority and employment, until the decision on appeal is rendered. The carrier shall promptly notify the other party in writing of any such appeal, by Registered Mail, Return Receipt Requested. The decision on such appeal shall be rendered within twenty calendar days of the date the notice of appeal is received, and the employe and the organization shall be promptly advised thereof in writing by Registered Mail, Return Receipt Re-

If the decision on such appeal is that the employe has not complied with the terms of this agreement, his seniority and employment under the Rules and Working Conditions Agreement shall be terminated within twenty calendar days of the date of said decision unless selection of a neutral is requested as provided below, or unless the carrier and the organization agree otherwise in writing. The decision on appeal shall be final and binding unless within ten calendar days from the date of the decision the organization or the employe involved requests the selection of a neutral person to decide the dispute as provided in Section 5 (c) below. Any request for selection of a neutral person as provided in Section 5 (c) below shall operate to stay action on the termination of seniority and employment until not more than ten calendar days from the date decision is rendered by the neutral person.

(c) If within ten calendar days after the date of a decision on appeal by the highest officer of the carrier designated to handle appeals under this agreement the organization or the employe involved requests such highest officer in writing by Registered Mail, Return Receipt Requested, that a neutral be appointed to decide the dispute, a neutral person to act as sole arbitrator to decide the dispute shall be selected by the highest officer of the carrier designated to handle appeals under this agreement or his designated representative, the Chief Executive of the organization or his designated representative, and the employe involved or his representative. If they are unable to agree upon the selection of a neutral person any one of them may request the Chairman of the National Mediation Board in writing to appoint such neutral. The carrier, the organization and the employe involved shall have the right to appear and present evidence at a hearing before such neutral arbitrator. Any decision by such neutral arbitrator shall be made within thirty calendar days from the date of receipt of the request for his appointment and shall be

final and binding upon the parties. The carrier, the employe, and the organization shall be promptly advised thereof in writing by Registered Mail, Return Receipt Requested. If the position of the employe is sustained, the fees, salary and expenses of the neutral arbitrator shall be borne in equal shares by the carrier and the organization; if the employe's position is not sustained, such fees, salary and expenses shall be borne in equal shares by the carrier, the organization and the employe.

(d) The time periods specified in this section may be extended in individual cases by written agreement between the carrier and the organization.

(e) Provisions of investigation and discipline rules contained in the Rules and Working Conditions Agreement between the carrier and the organization will not apply to cases arising under this agreement.

(f) The General Chairman of the organization shall notify the carrier in writing of the title(s) and address(es) of its representatives who are authorized to serve and receive the notices described in this agreement. The carrier shall notify the General Chairman of the organization in writing of the title(s) and address(es) of its representatives who are authorized to receive and serve the notices described in this agreement.

(g) In computing the time periods specified in this agreement, the date on which a notice is received or decision rendered shall not be counted.

Section 6. Other provisions of this agreement to the contrary notwithstanding, the carrier shall not be required to terminate the employment of an employe until such time as a qualified replacement is available. The carrier may not, however, retain such employe in service under the provisions of this section for a period in excess of sixty calendar days from the date of the last decision rendered

under the provisions of Section 5, or ninety calendar days from date of receipt of notice from the organization in cases where the employe does not request a hearing. The employe whose employment is extended under the provisions of this section shall not, during such extension, retain or acquire any seniority rights. The position will be advertised as vacant under the bulletining rules of the respective agreements but the employe may remain on the position he held at the time of the last decision, or at the date of receipt of notice where no hearing is requested pending the assignment of the successful applicant, unless displaced or unless the position is abolished. The above periods may be extended by agreement between the carrier and the organization involved.

Section 7. An employe whose seniority and employment under the Rules and Working Conditions Agreement is terminated pursuant to the provisions of this agreement or whose employment is extended under Section 6 shall have no time or money claims by reason thereof.

If the final determination under Section 5 of this agreement is that an employe's seniority and employment in a craft or class shall be terminated, no liability against the carrier in favor of the organization or other employes based upon an alleged violation, misapplication or noncompliance with any part of this agreement shall arise or accrue during the period up to the expiration of the 60 or 90 day periods specified in Section 6, or while such determination may be stayed by a court, or while a discharged employe may be restored to service pursuant to judicial determination. During such periods, no provision of any other agreement between the parties hereto shall be used as the basis for a grievance or time or money claim by or on behalf of any employe against the carrier predicated upon any action taken by the carrier in applying or complying with this agreement or upon an alleged viola-

tion, misapplication or non-compliance with any provision of this agreement. If the final determination under Section 5 of this agreement is that an employe's employment and seniority shall not be terminated, his continuance in service shall give rise to no liability against the carrier in favor of the organization or other employes based upon an alleged violation, misapplication or non-compliance with any part of this agreement.

Section 8. In the event that seniority and employment under the Rules and Working Conditions Agreement is terminated by the carrier under the provisions of this agreement, and such termination of seniority and employment is subsequently determined to be improper, unlawful, or unenforceable, the organization shall indemnify and save harmless the carrier against any and all liability arising as the result of such improper, unlawful, or unenforceable termination of seniority and employment; Provided, however, that this section shall not apply to any case in which the carrier is the plaintiff or the moving party in the action in which the aforesaid determination is made or in which case the carrier acts in collusion with any employe; Provided further, that the aforementioned liability shall not extend to the expense to the carrier in defending suits by employes whose seniority and employment are terminated by the carrier under the provisions of this agreement.

Section 9. An employe whose employment is terminated as a result of non-compliance with the provisions of this agreement shall be regarded as having terminated his employe relationship for vacation purposes.

Section 10. (a) The carrier shall periodically deduct from the wages of employes subject to this agreement periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in such organization,

and shall pay the amount so deducted to such officer of the organization as the organization shall designate: Provided, however, that the requirements of this subsection (a) shall not be effective with respect to any individual employe until he shall have furnished the carrier with a written assignment to the organization of such membership dues, initiation fees and assessments, which assignment shall be revocable in writing after the expiration of one year or upon the termination of this agreement whichever occurs sooner.

(b) The provisions of subsection (a) of this section shall not become effective unless and until the carrier and the organization shall, as a result of further negotiations pursuant to the recommendations of Emergency Board No. 98, agree upon the terms and conditions under which such provisions shall be applied; such agreement to include, but not be restricted to, the means of making said deductions, the amounts to be deducted, the form, procurement and filing of authorization certificates, the frequency of deductions, the priority of said deductions with other deductions now or hereafter authorized, the payment and distributions of amounts withheld and any other matters pertinent thereto.

Section 11. This agreement shall become effective on February 1, 1953, and is in full and final settlement of notices served on the carrier by the organizations signatory hereto on or about February 5, 1951. It shall be construed as a separate agreement by and on behalf of those employes represented by each organization.

This agreement is subject to approval of the United States District Court, for the Eastern District of Missouri.

This agreement shall remain in effect until modified or changed in accordance with the provisions of the Railway Labor Act as amended.

Signed at St. Louis, Missouri, this 12th day of January, 1953.

Guy A. Thompson, Trustee,
Missouri Pacific Railroad
Company, Debtor:

T. Short,
Chief Personnel Officer

Employes' National Conference
Committee, Seventeen Cooperating
Railway Labor Organizations:

G. E. Leighty
Chairman

LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. .....

LELAND R. COOK, JAMES RITCHIE, JOHN F. PRICE, LONNIE GIGERS, KELLY MAY, ISOM McMOORE, RUFUS PETTIS, HOPSON WILSON, I. B. WOODS and CURTIS J. NEAL,
Petitioners,

vs.

BROTHERHOOD OF SLEEPING CAR PORTERS, T. D. McNEAL, and MISSOURI PACIFIC RAILROAD COMPANY,
Respondents.

BRIEF

Of Respondent Missouri Pacific Railroad Company in Opposition to Petition for Writ of Certiorari.

GEORGE W. HOLMES,
HAROLD L. HARVEY,
2008 Missouri Pacific Building,
210 North Thirteenth Street,
St. Louis 3, Missouri,
Attorneys for Respondent, Missouri Pacific Railroad Company.

INDEX.

	Page
Questions presented	1
Statement	2
Argument	5
I. The state court properly dismissed petitioners' suit for want of jurisdiction, because primary jurisdiction of such proceedings lies with the National Railway Adjustment Board	5
II. Even if the state court had jurisdiction, it could have awarded no relief to petitioners, because they failed to join the Brotherhood as required by the Union Shop Agreement, and the railroad was required under the agreement to discharge the petitioners	11
III. Even if the state court had jurisdiction and could have granted relief, this court should not grant certiorari since no federal question is involved	14
Conclusion	15

Cases Cited.

Alabaugh v. B. & O. R. Co., 125 F. S. 401 (1954), 222 F. 2d 861 (1955), cert. den. 350 U. S. 839 (1955) 5, 7, 8, 11, 13

Elgin J. & E. Ry. Co. v. Burley, 325 U. S. 711 (1945) 9, 10, 11

Johns v. B. & O. R. Co., 118 F. S. 317 (1954), 347 U. S. 964 (1954) 7, 8, 11

McMullans v. K. O. & G. Ry. Co., 129 F. S. 157 (1955), 229 F. 2d 50 (1956), cert. den. 351 U. S. 918 (1956) 10, 11, 15
National Labor Relations Board v. Aluminum etc. Union, 230 F. 2d 515 (1956) 12, 13
Pennsylvania R. Co. v. Rychlik, 352 U. S. 480, 485 (1957) 15

Statute Cited.

Section 3, First, of the Railway Labor Act (48 Stat. 1189, 45 U. S. C., Section 153; First) 14

IN THE

SUPREME COURT OF THE UNITED STATES.

No. .....

LELAND R. COOK, JAMES RITCHIE, JOHN F. PRICE, LONNIE GIGERS, KELLY MAY, ISOM McMOORE, RUFUS PETTIS, HOPSON WILSON, I. B. WOODS and CURTIS J. NEAL,
Petitioners,

vs.

BROTHERHOOD OF SLEEPING CAR PORTERS, T. D. McNEAL, and MISSOURI PACIFIC RAILROAD COMPANY,
Respondents.

BRIEF

Of Respondent Missouri Pacific Railroad Company in Opposition to Petition for Writ of Certiorari.

QUESTIONS PRESENTED.

1. Whether the State Court had jurisdiction, in view of the primary jurisdiction of the National Railway Adjustment Board, to enjoin the discharge of petitioners by respondent Railroad because of petitioners' failure to join respondent Brotherhood, as required by the union shop contract between the Brotherhood and the Railroad, where petitioners were not notified of the Brotherhood's intention to enter into such contract, and did not as individuals authorize the contract.

2. Whether, even if the State Court had jurisdiction, it could have granted the relief sought by petitioners in view of their admitted failure to comply with the terms of the union shop contract.

STATEMENT.

Petitioners are classified for collective bargaining purposes as "train porters" (R. 1). Respondent Brotherhood of Sleeping Car Porters, which we will call the Brotherhood, is the duly designated representative of petitioners' craft (R. 2). On March 9, 1953, the Brotherhood and respondent Missouri Pacific Railroad, which we will refer to as the Railroad, entered into a union shop agreement which required all members of petitioner's craft to join the Brotherhood before June 1, 1953 (R. 4-5).

On March 13, 1953, four days after the signing of the union shop agreement, the Brotherhood wrote to the petitioners calling their attention to the provision of the agreement requiring them to join the Brotherhood before June 1, 1953 (R. 244-246). When no reply to this letter was received from petitioners, the Brotherhood on May 21, 1953 wrote a second letter to each of them, reminding them of the deadline for joining, and stating that if they did not become members before June 1, the Brotherhood would "have no choice but to serve notice on the Missouri Pacific to terminate your employment and seniority under our working agreement" (R. 246, 247).

At the time the contract was entered into and at the time of trial, petitioners were members of the International Association of Railway Employees (hereafter referred to as the Association), a labor organization which was a rival to the Brotherhood (R. 248, 269). Petitioner Gigers was president of the St. Louis local organization of the Association, petitioner Cook was its vice-president, and petitioner May was its secretary (Def. Ex. V, R. 274). After the union shop agreement was made, the Association advised at least one of the petitioners not to comply with the agreement (R. 115, 116), and the local Association ad-

vised all of the petitioners that they would be "protected" by the Association (Def. Ex. V, R. 272-275).*

None of the petitioners joined the Brotherhood (R. 247).

After June 1, each of the petitioners received from the Railroad a notice of non-compliance with the union shop agreement, and each petitioner then requested a hearing (R. 247). Each was given a hearing, and each admitted at the hearing that he had failed to join the Brotherhood before June 1 (R. 247). At each hearing a representative of the Brotherhood proposed that if the employee (although he was then in default) would join the Brotherhood at that time, the Brotherhood would be willing to drop the discharge proceedings. Each petitioner refused to do so (R. 247, 248).

After the hearings each petitioner received a letter from his superintendent ruling that he had failed to comply with the union shop agreement. Thereafter each petitioner appealed to the Railroad's chief personnel officer, as provided by the agreement, and in each case the superintendent's ruling was affirmed by the chief personnel officer without further hearing, but after reviewing the record of the initial hearing (R. 248).

Thereafter each petitioner requested appointment of a Neutral to review the decision of the chief personnel officer, as provided by the union shop agreement (R. 248).

About five months after the deadline for joining the Brotherhood, and shortly prior to the hearing before the

* In their original petition in the State Court, the petitioners asked for a declaratory judgment that, as members of the Association, they could not be required under the Railway Labor Act, to join the Brotherhood as a condition of their continued employment (R. 269). The allegations of the original petition to the effect that petitioners were members of the Association, that the Association was national in scope, and that petitioners therefore could not be required to join the Brotherhood, were abandoned when the amended petition was filed (R. 1-13).

Neutral in November, 1953, petitioners tendered their "joining fees" to the Brotherhood under protest (Pl. Exs. 67-78, R. 90; R. 86, 248). The tender was refused by the Brotherhood (R. 248).

In the case of each appeal, the Neutral, after hearing, sustained the Railroad's decision (Pl. Ex. 93, R. 109, 110; R. 248). Pursuant to the Neutral's decision the Railroad was about to discharge petitioners when the present suit was brought.

ARGUMENT.

I.

The State Court Properly Dismissed Petitioners' Suit for Want of Jurisdiction, Because Primary Jurisdiction of Such Proceedings Lies With the National Railway Adjustment Board.

The issues raised by the present petition for certiorari have either been passed on by this Court or have been raised in other cases in which this Court has denied certiorari. The trial court held (R. 317, 318) that under **Alabaugh v. B. & O. R. Co.**, 125 F. S. 401 (1954), 222 F. 2d 861 (1955), cert. den. 350 U. S. 839 (1955), it had no jurisdiction to entertain petitioners' suit. In **Alabaugh** the facts were almost identical to those presented here.* Plaintiffs, who were employees of the B. & O. Railroad, had been members of defendant Brotherhood of Locomotive Engineers, but after a union shop agreement was entered into between the Brotherhood and the B. & O., dropped their membership in the Brotherhood and joined UROC,

* Petitioners seek to distinguish the *Alabaugh* case on several grounds, all of which we believe to be differences without distinction. But some of the claimed differences we believe to be erroneously claimed. For example, petitioners say (Petition p. 19) that in the *Alabaugh* case no substantial question was raised as to the validity of the union shop agreement. In the district court opinion in the *Alabaugh* case it is pointed out (125 F. S., l. c. 406) that plaintiffs there claimed that the union shop agreement was invalid because it contained a provision not authorized by the 1951 amendment to the Railway Labor Act, which is one of the contentions made by petitioners here. Again, petitioners say (Petition p. 20) that in *Alabaugh* no question was raised as to whether the tender of initiation fees prior to discharge made it mandatory that the employes be admitted to membership. Certainly, a most similar, if not identical, question was raised in *Alabaugh*. The circuit court of appeals (222 F. 2d, l. c. 863, 864), notes that plaintiffs there contended that the union had discriminated against them by refusing to reinstate them (they had formerly been members and dropped their memberships to join a rival union) when they applied for

a rival labor organization, believing it to be national in scope. The Brotherhood expelled plaintiffs and called on the B. & O. to discharge them. After a hearing before one of the railroad's superintendents, who held that plaintiffs must be discharged, plaintiffs concluded that UROC was not a qualified union, and applied for reinstatement in the Brotherhood which, according to plaintiffs' petition, was refused by the Brotherhood because plaintiffs had been active in UROC, although other engineers, who had also terminated their membership in the Brotherhood but had been less active in UROC, were reinstated. Appeals were taken to the chief personnel officer, who affirmed the superintendent's decision and fixed a date for discharge. Plaintiffs then filed suit to restrain the railroad from discharging them and to restrain the Brotherhood from inducing their discharge. The district court held that it had no jurisdiction because primary jurisdiction of the matter was exclusively with the Railway Adjustment Board. The court said (125 F. S., l. c. 408, 409):

> "So far as Brotherhood's refusal to reinstate plaintiffs affects their discharge by B & O, it is clearly a dispute similar to those which the courts have held to be within the primary jurisdiction of the Adjustment Board."
>
> * * * * * * *
>
> "The remedy before the Adjustment Board is adequate. It has jurisdiction to declare a discharge improper and to require a railroad to reinstate the employee with back pay. Slocum v. Delaware L. & W. R. Co., 339 U. S. 239, at page 244, 70 S. Ct. 577, 94 L. Ed. 795. There is no lack of administrative remedy here such as existed in the Steele, Tunstall and Howard cases. Until the Adjustment Board acts, plaintiffs cannot show irreparable loss and inadequacy of legal remedy. Order of Railway Conductors v. Pitney, 326 U. S. 561, at page 567; 66 S. Ct. 322, 90 L. Ed. 318."

On appeal to the Fourth Circuit Court of Appeals that court affirmed, saying (222 F. 2d, l. c. 864, 865):

> "We think that the suit was properly dismissed by the court below for failure of the plaintiffs to exhaust administrative remedies before the National Railroad Adjustment Board, which has been given by Congress primary original jurisdiction over controversies of this sort."
>
> * * * * * * * *
>
> "The case here involves the rights of employees under a union shop agreement arrived at by collective bargaining. The interpretation of that agreement and the rights and grievances of employees thereunder are just the sort of matters that Congress intended to be handled in the first instance by the National Railroad Adjustment Board."
>
> * * * * * * * *
>
> "This is one of a number of cases in which controversies have arisen under union shop agreements because of the joining of UROC by members of the Brotherhood; and it has been repeatedly held in these cases that there is no jurisdiction in the courts over controversies of this character in the absence of exhaustion of remedies before the Board."

Certiorari was sought and was denied by this Court. **Alabaugh v. B. & O. Ry. Co.**, 350 U. S. 839 (1955).

The same result was reached in **Johns v. B. & O. R. Co.**, 118 F. S. 317 (1954), 347 U. S. 964 (1954). In the **Johns** case a similar suit had been brought by a UROC member to enjoin his discharge. He invoked the jurisdiction of a statutory three-judge court by alleging the unconstitutionality of the union shop amendment to the Railway Labor Act. The three-judge court held that it was without jurisdiction. Although its holding turned on the narrow issue

the court's conclusion that no such question was raised depended, in turn, on its view that primary jurisdiction lay with the Railway Adjustment Board. The court said (118 F. S., l. c. 320, 321):

> "Section 3 of the Act, 45 U. S. C. A., Sec. 153, created the National Railroad Adjustment Board, composed of members selected by the carriers and nationally recognized unions. This Board is given power on petition of either party to a labor dispute between an employee and a railroad to decide the dispute and make awards, including back pay awards enforcible by process in the district courts. The case at bar is one of a great number of similar cases now pending, or decided within the past year, prosecuted by UROC or its members to contest the discharge of its members for noncompliance with union shop agreements. In all of these reported cases, with one exception, the courts have held that this issue is a dispute within the meaning of Section 3, First (1), cognizable by the Board, and that the courts are without jurisdiction."
>
> * * * * * * *
>
> "Furthermore, the existence of the administrative remedy in this case more clearly impels us to hold that no cause is presented for consideration by three judges. That the remedy afforded to an aggrieved employee by Section 3 of the Act must be exhausted before resort is had to the courts has been reiterated in numerous decisions, applying the Act."

Plaintiff appealed to this Court, and in a per curiam decision without opinion, this Court affirmed the three-judge court. **Johns v. B. & O. R. Co.**, 347 U. S. 964 (1954).

Petitioners seek to distinguish the **Alabaugh** case (Petition p. 19) because no question was raised there as to the necessity of the Brotherhood notifying those whom it represented of its intention to negotiate a union shop agreement.

Petitioners argue that the union shop agreement in the case at bar was void because of such lack of notice, and therefore that the State Court had jurisdiction. This Court, in **Elgin J. & E. Ry. Co. v. Burley**, 325 U. S. 711 (1945), expressed its view that a union designated as a bargaining agent under the Railway Labor Act does not have to notify those whom it represents of its intention to negotiate a contract with a carrier. In the **Elgin** case, the question was whether the Brotherhood of Railroad Trainmen could prosecute and compromise time claims of its members, without notice to them. This court carefully pointed out the difference between the authority of the union, conferred by the Railway Labor Act, to enter into prospective agreements binding on all members, and its authority to handle grievances of individual members. The court concluded that in settling grievances, such as time claims, the employee was entitled to notice and an opportunity to participate, **even though no such notice was necessary for the union to enter into a valid collective bargaining agreement.** In the latter situation, the Act itself confers full authority on the union. The court said (325 U. S., l. c. 728, 740):

> "The statute itself vests exclusive authority to negotiate and to conclude agreements concerning major disputes in the duly selected collective agent. Cf. Virginian R. Co. v. System Federation, R. E. D., 300 U. S. 515, 81 L. ed. 789, 57 S. Ct. 592, supra. Since the entire statutory procedure for settling major disputes is aimed only at securing agreement and not decision, unless the parties agree to arbitration, this exclusive authority includes representation of the employees not only in the stage of conference, but also in the later ones of mediation, arbitration and conciliation.
>
> . . . . . .
>
> "The Brotherhood had power, therefore, **as collective agent** to make an agreement with the carrier, effective for the future only, to settle the question of

starting time, and that power was derived from the Act itself. **In dealing within its scope, the carrier was not required to look further than the Act's provisions to ascertain the union's authority.**" (Emphasis supplied.)

Although this Court's declaration of the law in **Elgin** was not part of its holding, the question was squarely presented in **McMullans v. K. O. & G. Ry. Co.**, 129 F. S. 157. (1955), 229 F. 2d 50 (1956), cert. den. 351 U. S. 918 (1956). There, an agreement was negotiated between the railroad and the certified brotherhood providing for compulsory retirement of engineers at age 70. Plaintiffs contended (as petitioners do here) that the agreement was void because no notice had been given to them, and also contended (as petitioners do here) that the agreement deprived them of property rights protected by the Fifth Amendment. The Circuit Court of Appeals said (229 F. 2d, l. c. 56):

> "These contentions are without merit. It is conceded that the B. L. F. & E. was the duly selected and certified bargaining agent for the craft including these plaintiffs, with authority to contract with the railroad on matters relating to rates of pay, rules and working conditions. The Railway Labor Act requires railroads to 'treat with' certified representatives of the employees and with no others. 45 U. S. C. A., Sec. 152, Ninth; Virginian R. Co. v. System Fed. No. 40, 300 U. S. 515, 545, 548, 57 S. Ct. 592, 81 L. Ed. 789; Lewellyn v. Fleming, supra. In the Lewellyn case (154 F. 2d 213), it was stated that the Act 'undoubtedly included the authority to prospectively contract with reference to seniority rights of the members of the craft, whether members of the union or not.' The compulsory retirement provisions of the contract with which we are dealing are prospective, and are not retroactive in any respect. They do not affect rights already accrued. They seek to change existing terms of the contract

and to apply those changes in the future. This, the bargaining agent has the power to do. Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711, 739, 65 S. Ct. 1282, 89 L. Ed. 1886. The contractual provisions were for the collective interests of all the employees represented, even though some were adversely affected. Since the Railway Labor Act does not create a permanent status for employees or fix unlimited tenure in their jobs, there was no violation of the plaintiffs' Constitutional rights.

"The bargaining agent is the representative of the craft and is not required to consult with individual members or to give them notice of contemplated contractual actions within the scope of its authority."

Certiorari to this Court was sought, and was denied. **McMullans v. K. O. & G. Ry. Co.**, 351 U. S. 918 (1956).

We submit that the **Alabaugh, Johns, Elgin** and **McMullans** cases settle the question presented here, and that the State Court was clearly right in holding that it had no jurisdiction.

II.

Even If the State Court Had Jurisdiction, It Could Have Awarded No Relief to Petitioners, Because They Failed to Join the Brotherhood as Required by the Union Shop Agreement, and the Railroad Was Required Under the Agreement to Discharge the Petitioners.

Admittedly, the union shop agreement required all employees represented by the Brotherhood to join the Brotherhood before June 1, 1953 (Pl. Ex. 2, R. 15). No contention is made that petitioners joined within the required period. Petitioners, however, contend that in equity they should not be discharged because they tendered their joining fees to the Brotherhood before actual discharge.

Let us examine the facts. After the agreement was entered into on March 9, 1953, the Brotherhood wrote to each of the petitioners on March 13, calling their attention to the agreement's provision that all train porters were required to join the Brotherhood before June 1, 1953 (R. 244-246). When no reply to this letter was received, the Brotherhood on May 21, 1953, wrote a second letter to each of the petitioners, warning them that if they did not comply with the agreement the Brotherhood would call on the Railroad to terminate their employment and seniority (R. 246, 247). In spite of this letter the petitioners failed to join.

Thereafter, each petitioner received from the Railroad a notice of non-compliance with the union shop agreement, and each petitioner then requested a hearing (R. 247). Each was given a hearing, and each admitted at the hearing that he had failed to join the Brotherhood by June 1 (R. 247). **At each hearing a representative of the Brotherhood proposed that if the employee (although he was then in default) would join the Brotherhood at that time, the Brotherhood would be willing to drop the discharge proceedings.** Each petitioner refused to do so (R. 247, 248).

Five months after the deadline for joining the Brotherhood and shortly prior to the hearing before the Neutral in November, 1953, petitioners for the first time tendered their joining fees. This tender was refused by the Brotherhood (R. 248).

Petitioners contend this was a proper tender. They rely on **National Labor Relations Board v. Aluminum etc. Union,** 230 F. 2d 515 (1956). This case merely held that plaintiff was entitled to reinstatement in her union when she had in good faith tendered her dues at a time when they would have been payable under a union by-law which, unknown to plaintiff, had been changed to make the dues

payable earlier. Plainly petitioners' situation is not even remotely similar to that of the plaintiff in the **N. L. R. B.** case.

Petitioners' position on the question of tender is like that of the plaintiffs in **Alabaugh v. B. & O. R. Co.**, 125 F. S. 401 (1954). There, plaintiffs were members of a rival union, U. R. O. C., and either had failed to join or had dropped membership in the Brotherhood of Locomotive Engineers. However, when their discharge became imminent, plaintiffs sought reinstatement in the Brotherhood and contended, as petitioners do here, that it would be discriminatory not to allow them to be reinstated. The District Court said (125 F. S., l. c. 407, 408):

> "Plaintiffs contend that Brotherhood's refusal to reinstate them is a discrimination analogous to the discriminations in the Steele, Tunstall and Howard cases.
>
> "In those cases contracts between the union and the carrier were declared invalid because the union had negotiated contracts which clearly discriminated against the Negro members of the bargaining unit solely because of their race.*
>
> "The situation in our case is quite different. Plaintiffs voluntarily stopped paying dues to Brotherhood and terminated their membership therein, in order to join and be active in a rival union. Plaintiffs gambled heavily for a stake which must have seemed worth the risk to them at that time. By terminating their membership in Brotherhood and ceasing to pay dues to it, they made themselves subject to discharge by B. & O. under the terms of the union shop agreement, unless they could show that U. R. O. C. was a labor organization which qualified under section 152 Eleventh (c). They could have hedged their bet by continuing to pay dues to Brotherhood after joining U. R. O. C., pending

* In the case at bar there is no issue of racial discrimination.

determination of U. R. O. C.'s status. If they had continued to pay dues to Brotherhood, that union might have expelled them for dual unionism, but B. & O. could not have discharged them, in view of the provisions of section 152 Eleventh (c). They would have continued in their employment as 'free riders.' But they chose to stake all on U. R. O. C. Having lost, they sought reinstatement in Brotherhood.

"When plaintiffs applied for reinstatement in Brotherhood, it was within the discretion of that organization whether or not they should be reinstated. There is no provision in the statute or in the agreement with the B. & O. which requires such action.

"The courts cannot require individuals or associations to be forgiving or generous nor prevent the operation of the rule that 'they that take the sword shall perish with the sword' unless some constitutional or other legal right or immunity is threatened. Nor does the action of Brotherhood in reinstating some members who had been less active in U. R. O. C. create any right in plaintiffs to secure an order for reinstatement in this case."

The Court will recall that the foregoing decision was affirmed by the Fourth Circuit Court of Appeals (222 F. 2d 861), and that this Court denied certiorari (350 U. S. 839).

III.

Even If the State Court Had Jurisdiction and Could Have Granted Relief, This Court Should Not Grant Certiorari Since No Federal Question Is Involved.

No federal question is involved in this case. As stated above, petitioners are members of the International Association of Railway Employees. No contention is made by them that the Association is national in scope or has been certified as such under Section 3, First, of the Railway Labor Act (48 Stat. 1189, 45 U. S. C. Section 153 First (i)

In fact, it has not been (R. 314-316). Since the Association was not so qualified, petitioners had no federal right to join the Association in lieu of the respondent Brotherhood of Sleeping Car Porters, their authorized bargaining representative. Accordingly their threatened discharge does not raise any federal question. **Pennsylvania R. Co. v. Rychlik**, 352 U. S. 480, 485 (1957). Nor is any substantial constitutional question presented under the Fifth Amendment. **McMullans v. K. O. & G. Ry. Co.**, 129 F. S. 157 (1955), 229 F. 2d 50 (1956), cert. den. 351 U. S. 918 (1956).

CONCLUSION.

We submit that the State Court had no jurisdiction of this suit, because primary jurisdiction of such matters has been conferred by Congress on the Railway Adjustment Board. However, if the State Court had assumed jurisdiction, it could have granted no relief to petitioners since, under the facts shown at the trial, the Railroad was obligated to discharge them. In any event, this Court should not grant certiorari since no federal question is involved.

Respectfully submitted,

GEORGE W. HOLMES,
HAROLD L. HARVEY,
2008 Missouri Pacific Building,
210 North Thirteenth Street,
St. Louis 3, Missouri,
Attorneys for Respondent, Missouri Pacific Railroad Company.